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IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

JERRY TARKANIAN, TIM GRGURICH,
RONALD GANULIN and SHELLEY FISCHER,

Petitioners

vs.

NATIONAL COLLEGIATE ATHLETIC ASSOCIATION,

Respondent.

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the Ninth Circuit's decision, which infers that the Commerce Clause prohibits states from providing due process protections to their citizens greater than those provided under the United States Constitution, violates the Tenth Amendment and Federalism concerns?

2. Whether the Ninth Circuit's decision that a statute that does not directly discriminate against interstate commerce and does not favor in-state economic interests nevertheless violates the Commerce Clause *per se*, conflicts with this Court's decisions mandating consideration of a state's interests in exercising its police powers?

LIST OF PARTIES

Jerry Tarkanian, Tim Grgurich, Ronald Ganulin and Shelley Fischer, as the petitioners, and the National Collegiate Athletic Association, as the respondent, are the parties before this Court pursuant to this Petition. Petitioners believe that the following, who were parties to the proceeding below, were either dismissed by the lower court or no longer have an interest in the outcome of the proceedings in this Court:

1. Robert F. Miller, Governor, State of Nevada
2. Carolyn Sparks, Member of the Board of Regents of the University of Nevada
3. James Eardley, Member of the Board of Regents of the University of Nevada
4. Lonnie Hammargren, Member of the Board of Regents of the University of Nevada
5. Shelley Berkley, Member of the Board of Regents of the University of Nevada
6. Jill Derby, Member of the Board of Regents of the University of Nevada
7. Joseph Foley, Member of the Board of Regents of the University of Nevada
8. June Whitley, Member of the Board of Regents of the University of Nevada
9. Daniel Klaich, Member of the Board of Regents of the University of Nevada
10. Dorothy Gallagher, Member of the Board of Regents of the University of Nevada
11. Michael Alsup

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IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1993

JERRY TARKANIAN, TIM GRGURICH, RONALD GANULIN and SHELLEY FISCHER, *Petitioners*,

v.

THE NATIONAL COLLEGIATE ATHLETIC ASSOCIATION, *Respondent*.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Jerry Tarkanian, Tim Grgurich, Ronald Ganulin and Shelley Fischer respectfully petition for a writ of certiorari to review the opinion of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The opinion of the Ninth Circuit Court of Appeals is reported at 10 F.3d 633 and is reprinted herein as Appendix A. The Memorandum Decision and Order of the United States District Court for the District of Nevada is reported at 795 F. Supp. 1476 (D. Nev. 1992) and is reprinted herein as Appendix B.

JURISDICTION

The Ninth Circuit entered its judgment on November 23, 1993. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISION INVOLVED

Sections 398.005 through 398.255 of the Nevada Revised Statutes (the "Nevada Due Process Statute" or the "Statute") is reprinted herein as Appendix C.

STATEMENT OF THE CASE

As a result of the holding of this Court in *National Collegiate Athletic Ass'n v. Tarkanian*, 488 U.S. 179, 109 S. Ct. 454, 102 L. Ed. 2d 469 (1988) that respondent, the National Collegiate Athletic Association, is not a state actor and, therefore is not required to provide due process under the Fourteenth Amendment, several states have independently enacted legislation which requires such associations to provide certain minimum levels of due process to those states' citizens who are being subjected to disciplinary action.

The enactment of such a statute by the Nevada legislature caused the NCAA to halt its prosecution of petitioners, Jerry Tarkanian, Tim Grgurich, Ron Ganulin, and

Shelley Fischer, and file suit challenging the constitutionality of the Statute on four grounds. The District Court concluded that the Statute violated Article I, Section 8, Clause 3 of the United States Constitution (the "Commerce Clause"). Although the District Court found that the Statute did not directly discriminate against interstate commerce or favor in-state economic interests over out-of-state interests, it concluded that the legitimate interests of the state were outweighed by the general harm to interstate commerce.

The Ninth Circuit affirmed the District Court, but did so using an analysis which ignores the purpose of the Commerce Clause. The Ninth Circuit concluded that the Nevada Due Process Statute was a *per se* violation of the Commerce Clause, not because it discriminates against interstate commerce or treats in-state economic interests more favorably than out-of-state interests, but simply because the Statute "directly regulates" interstate commerce.

Such an analysis summarily eliminates the ability of a state to exercise its police powers irrespective of the state interest being promoted. For this reason, the Ninth Circuit opinion conflicts with many decisions of this Court and threatens to allow the Commerce Clause to consume states' sovereignty rights protected by the Tenth Amendment.

A. The Need For State Protection

In the ten years of litigation leading up to this Court's decision in *National Collegiate Athletic Ass'n v. Tarkanian*, *supra*, the record of the NCAA's alleged procedural due process atrocities was well documented by at least two independent trial courts.

The first Nevada court to review the NCAA's investigative and enforcement proceedings stated:

> The case against Tarkanian was incredible. The evidence the NCAA presented was 100% hearsay without a scrap of documentation in substantiation. The evidence shows that every fundamental principle pertaining to [Tarkanian's] due process rights were violated. The Committee on Infractions and its staff conducted a star chamber proceeding and a trial by ambush against [Tarkanian]. [Tarkanian] was denied the basic charges against him and the facts upon which such charges are based. [Tarkanian] was denied the right to present evidence and to call witnesses in his behalf. And most important, he was denied the right to be confronted by witnesses against him and cross-examine them. The Committee on Infractions allowed a staff investigator [David Berst], who, the evidence clearly shows, swore he would get Tarkanian if it was the last thing he ever did, to act as investigator, judge and jury. The record is replete with lies, distortions and half-truths. The evidence clearly shows Berst as a man possessed and consumed with animosity toward [Tarkanian]. There is no legal credible evidence to support the findings and actions of the NCAA.

CR 108, Reference 5A at 5-8.

After a remand for joinder of the NCAA, a separate trial court again reviewed the evidence. CR 108, Reference 1 at 4; *see Tarkanian v. National Collegiate Athletic Ass'n*, 103 Nev. 331, 741 P.2d 1345 (1987), *rev'd*, 488 U.S. 179 (1988). The second Nevada trial court similarly concluded in its 1984 Preliminary Statement, Findings of Fact, Conclusions of Law, Opinion, Order and Judgment:

> This case presents a classic example of how misperception becomes suspicion, which in turn becomes hostility, which leads, inevitably, to a deprivation of one's rights. . . . In short, the NCAA now seems to say: If you want to play ball, you must join us, obey rules and surrender any claim you may have under the Bill of Rights. This Court disagrees with that attitude, as any fair-minded person must. . . . Regrettably, both the full-time investigators and part-time Committee and Council members acted and thought, not like Caesar's wife, but rather as arrogant lords of the manor. At least one of the NCAA's investigators [David Berst] inspired, authored and drafted -- in whole or in part -- the NCAA preliminary investigation; the authority to issue an inquiry to UNLV; the Official [letter of] Inquiry; the minutes of the Committee on Infractions wherein the Committee's rules . . . appeared; the Confidential Report of the Committee; the Findings and penalty imposed by that Committee; the Expanded Confidential Report (with the Enforcement Division's comments) used by the Council on appeal; and the order of the

> Council and the widely-promulgated press release about the supposed violations of NCAA "legislation." . . . These NCAA practices might be considered "efficient," but so was Adolph Eichmann and so [was] the Ayatollah. The NCAA, incredibly, sought to equate "time" with "due process." The reasoning of the NCAA was, apparently, that since the Infractions Committee's and the NCAA council's presentation were time-consuming, Tarkanian and UNLV were afforded due process. In sum, what started out as an association whose members met and exceeded certain lofty goals, ended up as the NCAA-bureaucracy which looks upon its friends (sycophants) with feigned pleasure, and its enemies (those who still recognize the U.S. Constitution) with barely-concealed malevolence.

CR 108, Reference 9 at 11-17.

The Nevada state court entered a permanent injunction against UNLV and the NCAA to prevent them from suspending Tarkanian, CR 108, Reference 9 at 16-18, and the NCAA appealed the adverse ruling to the United States Supreme Court. It was in the *National Collegiate Athletic Ass'n v. Tarkanian* decision that this Court concluded that the NCAA was not a "state actor," and therefore was not required to provide constitutional due process. *National Collegiate Athletic Ass'n v. Tarkanian*, 488 U.S. at 199, 109 S. Ct. at 465.

In the absence of intervention on the part of the states, an accused, facing potential loss of livelihood, revenue and reputation before the NCAA infractions committee, would have no right to such basic due process protections as a transcript of his disciplinary hearings, an unbiased hearing officer, or an opportunity for a meaningful appeal. Although required to turn over to the NCAA all evidence relevant to his charges, an accused attempting to prepare for an upcoming infractions committee hearing would not have the right to obtain copies of evidence compiled by the NCAA against him.

To date, Nevada, Nebraska, Florida and Illinois have enacted their own statutory scheme of minimum procedural due process protections for state employees, students and citizens subject to discipline proceedings such as those conducted by the NCAA. At least five other states are considering such legislation.

The essence of the Nevada Due Process Statute is that the Nevada institutions, its employees, student-athletes, students or boosters who are made the subject of such enforcement proceedings must be provided basic notions of due process. To the extent not already provided by the rules of enforcement, the Nevada Due Process Statute requires that the accused be provided reasonable notice of proceedings, the rules governing those proceedings, and the violations alleged to have occurred. The accused must be allowed an attorney, be allowed to provide witnesses in his defense, and to confront and respond to evidence against him. The accused must be allowed to exchange evidence with his accuser. The accused has the right to require that statements used in such proceedings be signed under oath and notarized. The accused also has the right to a record of

the proceeding. Finally, the accused has the right to a hearing before an impartial fact finder.

The question presented here is simple: If the NCAA is not a state actor and, therefore, is not required to provide due process under the Fifth or Fourteenth Amendments of the United States Constitution, may it use the Constitution to prevent the states from enacting legislation which will ensure their citizens certain minimum levels of procedural due process?

B. Proceedings Below

Shortly after this Court issued its decision in *National Collegiate Athletic Ass'n v. Tarkanian*, *supra*, the NCAA began two proceedings affecting the State of Nevada. First, it summoned UNLV to appear before the infractions committee to show cause why UNLV had not suspended Coach Tarkanian in 1977. Even though UNLV was subject to a Nevada state court permanent injunction prohibiting it from suspending Coach Tarkanian, the NCAA placed UNLV on an additional year of probation because of the University's refusal to violate the court order. Second, the NCAA also commenced a new investigation of UNLV and Coach Tarkanian.

The opinion of this Court in *National Collegiate Athletic Ass'n v. Tarkanian, supra*, coupled with the subsequent conduct of the NCAA, prompted the Nevada legislature to enact the Nevada Due Process Statute.

Rather than continue its investigation in accordance with the Nevada Due Process Statute, the NCAA filed a complaint for declaratory judgment and injunctive relief

against Robert F. Miller, Governor, State of Nevada,[1] Tarkanian, Grgurich, Ganulin, and Fischer in the District Court of Nevada. The lawsuit filed by the NCAA sought a declaratory judgment that the Nevada Due Process Statute was constitutionally infirm under Commerce Clause; Article I, Section 10, Clause 1 of the United States Constitution (the "Contract Clause"); the Freedom of Association Clause of the First Amendment (the "Freedom of Association Clause"); and the Due Process Clause of the Fourteenth Amendment (the "Due Process Clause"). The NCAA also sought an order to enjoin the application of the Nevada Due Process Statute to the infractions case brought by the NCAA against UNLV, Tarkanian, Grgurich, Ganulin, and Fischer.

The District Court held that the Nevada Due Process Statute violated the Commerce and the Contract Clauses. Although the District Court found no *per se* violation of the Commerce Clause, it nevertheless invalidated the Statute because "any narrow interests the State of Nevada may have in imposing the requirements of [the Nevada Due Process Statute] for the protection of institutions and individuals residing in Nevada is outweighed by the general harm to the uniform enforcement regulations by the NCAA . . . ."[2] App., B18.

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[1] Governor Miller was subsequently dismissed as a party pursuant to an order of the District Court.

[2] The District Court also concluded that the Nevada Due Process Statute constituted a substantial impairment of the contractual relationship between UNLV and the NCAA which was unnecessary to achieve a valid state interest. App., B25.

The Ninth Circuit affirmed the District Court, but did so using an unprecedented analysis. While acknowledging the District Court's finding that the statute neither directly discriminates nor favors in-state economic interests over out-of-state interests, the court nevertheless found the Nevada Due Process Statute to be a *per se* violation of the Commerce Clause simply because it directly regulated interstate commerce, and in doing so, failed to even consider Nevada's interests in enacting the legislation.

REASONS FOR GRANTING THE PETITION

I. The Ninth Circuit's Action, In Determining That The Commerce Clause Prohibits States From Providing Their Citizens Due Process Protections, Violates The Tenth Amendment and Federalism Concepts.

In a single decision, the Ninth Circuit Court of Appeals held that the Commerce Clause prohibits states from granting procedural due process protections to their citizens beyond those provided in the United States Constitution. This decision directly contravenes the Tenth Amendment of the United States Constitution, this Court's decisions in the area of the independent state grounds doctrine, and the concept of federalism inherent in our governmental system.

In its opinion, the District Court found that the Nevada statute:

> seeks to impose certain minimum 'due process' procedural standards on the NCAA

> when the NCAA is investigating a Nevada member institution. The statute does not facially discriminate against interstate commerce, nor does it sound of economic protectionism. Further, the statute's effect on interstate commerce is only indirect; that is, it does not overtly thwart or block the NCAA's relationship with the Nevada member institutions or its relationship with member institutions in other states.

App., B13. The District Court also found that the purpose of the statute -- to afford basic due process protections to state citizens -- is a matter of legitimate local interest, App., B14, and one that is within the legitimate police powers of the state. App., B24.[3]

Thus, it has been clearly established by the opinions in the lower courts that:

> 1. The statute, in a legitimate exercise of police power, has as its goal to extend procedural due process protections to its citizens beyond those provided by the Due Process clauses of the Fourteenth or Fifth Amendments;[4] and

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[3] While it did not engage in the balancing test as the District Court did, the Ninth Circuit nevertheless did not question any of these findings. App., A14 n.8.

[4] In *National Collegiate Athletic Ass'n v. Tarkanian, supra*, this Court held that the NCAA was not a state actor, and thus was not required to provide due process under the Constitution.

2. The statute does not directly discriminate against or interfere with interstate commerce.

Nevertheless, despite these clear, uncontroverted and unassailable findings, the Ninth Circuit held that the statute "violates the Commerce Clause." App., A15. Its rationale was that state regulation of this national entity would "force the NCAA to regulate the integrity of its product in every state" because the NCAA itself has adopted regulations requiring uniformity in its proceedings nationwide. App., A11.

How does this differ from a situation where a state regulates the bottling or labeling of a product, thus forcing an interstate manufacturer to alter its product to comply with its laws? *See, e.g., Minnesota v. Cloverleaf Creamery Co.*, 449 U.S. 456, 101 S. Ct. 715, 66 L. Ed. 2d 659 (1981) (labeling). How does it differ from the situation where a state regulates the employment rights of workers, or mandates workers' compensation insurance, thus forcing an employer to provide different contract negotiation and employee appeals procedures from state to state? *See, e.g., Collins v. American Business, Inc.*, 350 U.S. 528, 76 S. Ct. 582, 100 L. Ed. 672 (1956), *reh'g denied*, 351 U.S. 928, 76 S. Ct. 778, 100 L. Ed. 1457 (1956) (worker's compensation); *Erie R.R. v. Williams*, 233 U.S. 685, 34 S. Ct. 761, 58 L. Ed. 1155 (1914) (wages). If a national commercial entity itself adopts an internal policy providing uniformity in its procedures or in treatment of its employees, the Ninth Circuit's opinion renders unconstitutional any state law which purports to place restrictions or changes upon the uniform method of operation.

The Ninth Circuit's decision violates the test this Court set forth in determining whether an exercise of federal power under the Commerce Clause violates the Tenth Amendment, and abrogates the federalism concerns in our governmental system. These are the reasons this Court should review this case, or face the possibility that all national corporations may avoid the application of any nondiscriminatory state law merely by adopting a policy of internal uniformity.

As this Court has consistently noted, a state may provide greater protections to its citizens than those provided under the United States Constitution. *See, e.g., Harper v. Virginia Dep't of Taxation*, 113 S. Ct. 2510, 2520, 125 L. Ed. 2d 74 (1993). This doctrine applies to due process protections, as well as to other constitutional protections:

> State law may provide relief beyond the demands of federal due process . . .

Id. The extension of greater protections to and regulation of the citizens under the laws of one state than of another is one of the unavoidable incidents of a federalist government. As this Court observed, the federalism of our governmental system means that permissible state regulation will naturally result in some burdens on national interests:

> [T]he Constitution presupposes the continued existence of the states functioning in coordination with the national government, with authority in the states to . . . regulate their internal affairs and policy, and . . . state regulation. [This] inevitably imposes some burdens on the national government of

> the same kind as those imposed on the citizens of the United States within the state's borders. *And we have held that those burdens, save as Congress may act to remove them, are to be regarded as the normal incidents of the operation within the same territory of a dual system of government . . . .*

Penn Dairies v. Milk Control Comm'n, 318 U.S. 261, 270-1, 63 S. Ct. 617, 621, 87 L. Ed. 2d 748 (1943) (emphasis added).

The Court therefore recognized in *National League of Cities v. Usery*, 426 U.S. 833, 96 S. Ct. 2465, 49 L. Ed. 2d 245 (1976), that the tension between the state and federal governments requires restraint by the federal system. In the absence of that restraint, federal regulation of state governments might, if left unchecked, "allow the national government to devour the essentials of state sovereignty." *E.E.O.C. v. Wyoming*, 460 U.S. 226, 236, 103 S. Ct. 1054, 1060, 75 L. Ed. 2d 18 (1983). Thus, the Tenth Amendment of the United States Constitution, which preserves state sovereignty, limits federal exercise of power under the Commerce Clause. Specifically, this Court held that the Tenth Amendment is "an affirmative limitation on the exercise of congressional power under the Commerce Clause." *Id.*

In order to satisfy the federalism concerns covered by the Tenth Amendment, this Court in *National League of Cities, supra*, set forth a three-part test to determine whether a federal extension of Commerce Clause power violated the Tenth Amendment. *Hodel v. Virginia*

Surface Mining & Reclamation Ass'n, Inc., 452 U.S. 264, 287-8, 101 S. Ct. 2352, 2366, 69 L. Ed. 2d 1 (1981).[5]

The Ninth Circuit's opinion violated every prong of that test, and represents a federal government overreaching into an indisputable aspect of state sovereignty -- the provision of fundamental protections to state citizens. If not reviewed, the Ninth Circuit's opinion will:

1. Allow any commercial entity to avoid the application of state law under the Commerce

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[5] Under that test, a federal exercise of Commerce Clause power violates the Tenth Amendment where: 1) it "regulates the states as states"; 2) it addresses matters that are indisputable "attributes of state sovereignty"; and 3) the states' compliance with the federal law would directly impair their ability "to structure integral operations in areas of traditional governmental functions." *Hodel v. Virginia Surface Mining & Reclamation Ass'n, Inc.*, 452 U.S. 264, 287-8, 101 S. Ct. 2352, 2366, 69 L. Ed. 2d 1 (1981).

Here, the Ninth Circuit's actions meet all three prongs of the *National League of Cities* test. First, it directly limits Nevada's ability to enact a statute providing its citizens with greater due process protections than those provided under the Federal Constitution or federal statutes; thus it regulates Nevada "as a state." Second, it addresses Nevada's provision of due process protections to its citizens, and thus addresses a matter that is an "indisputable attribute of state sovereignty." Even the District Court recognized this when it found that the Nevada Due Process Statute "does represent a legitimate exercise of police power. . . ." App., B24. Finally, it directly impairs Nevada's ability to provide that due process to its citizens. The Ninth Circuit in essence held that a state may not require interstate entities to provide to its citizens even those basic procedural due process guarantees provided by this statute, unless the federal government enacts uniform due process procedures nationally.

Clause merely by adopting a policy requiring uniformity of procedures within the organization; and

2. Under color of the Commerce Clause, limit states' granting of due process protections to their citizens to those provided by the United States Constitution, or by an Act of Congress.

This Court should not allow the opinion to stand.

II. The Ninth Circuit's Interpretation Of The Commerce Clause Conflicts With This Court's Decisions Which Mandate That A State's Interests In Exercising Its Police Powers Must Be Considered.

In order to find that the Nevada Due Process Statute was a *per se* violation of the Commerce Clause, the Ninth Circuit ignored the fundamental basis for the existence of the Commerce Clause which is to create an area of free trade among the states. *Westinghouse Elec. Corp. v. Tully*, 466 U.S. 388, 402-3, 104 S. Ct. 1856, 1865, 80 L. Ed. 2d 388 (1984).

The District Court began its analysis of the Due Process Statute by first determining that the statute did not directly discriminate against interstate commerce or favor in-state economic interests over out-of-state interests. App., B13-14. The District Court then applied a balancing test and concluded that the Statute's burden on interstate commerce exceeded the local benefits. App., B14-19.

The Ninth Circuit refused to consider the local interests advanced by the Statute.[6] App., A14. Instead, the Ninth Circuit found that the District Court had erred in determining that the statute was not a *per se* violation "because discrimination and economic protectionism are not the sole test. The court should have also considered whether the statute directly regulates interstate commerce." App., A10.

Using the Ninth Circuit's methodology, it is irrelevant that the challenged statute does not discriminate against interstate commerce and does not treat in-state economic interests any differently than it treats out-of-state interests. Under the Ninth Circuit's analysis, the mere fact that interstate commerce is regulated, albeit on an even-handed basis, is sufficient to create a *per se* violation of the Commerce Clause and end any further inquiry into the matter.

The Ninth Circuit's analysis is defective because it ignores the inherent ability of the state to exercise its police powers even where interstate commerce is regulated. Contrary to the Ninth Circuit's interpretation, both the *Healy* and the *Brown-Forman* cases acknowledge that "the critical consideration is the overall effect of the statute on both *local* and interstate activity." *Brown-Forman Distillers Corp. v.*

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[6] The court in dictum in a footnote did state that if balancing were necessary or appropriate, the balance struck by the District Court was right. App., A14 n.8. However, this is merely dictum and reflects only that the Ninth Circuit did not undertake a complete analysis of Nevada's interest in passing the legislation. Moreover, as recognized by the Ninth Circuit, Petitioners were entitled to a *de novo* review of the District Court's decision. App., A9. This one-sentence reference to the District Court's findings hardly constitutes a *de novo* review.

New York State Liquor Auth., 476 U.S. 573, 579, 106 S. Ct. 2080, 2084, 90 L. Ed. 2d 552 (1986) (emphasis added); *Healy v. Beer Institute, Inc.*, 491 U.S. 324, 340-1, 109 S. Ct. 2491, 2501, 105 L. Ed. 2d 275 (1989). Subsequent to the *Healy* and *Brown-Forman* decisions, this Court reaffirmed the proposition that a state legislature's interests in enacting a statute must always be considered in determining whether a statute violates the Commerce Clause. *Chemical Waste Management, Inc. v. Hunt*, 112 S. Ct. 2009, 2014, 119 L. Ed. 2d 121 (1992). The Ninth Circuit's refusal to consider the interests of the state in enacting legislation such as the Nevada Due Process Statute is clearly in conflict with this Court's mandates.

Had the Ninth Circuit considered the state's interests in passing the legislation, it might have concluded that the interests of the state in affording basic due process rights to its citizens are of such vital importance that, given the lack of other alternatives to achieve this important state interest, the state was properly exercising its police power when it enacted the Nevada Due Process Statute.

Where a state statute does not directly discriminate against interstate commerce, and where its effect is not to favor in-state economic interests over out-of-state interests, it is improper for a court to strike down the statute as a *per se* violation. Yet this is exactly what the Ninth Circuit has done. This petition should be granted on this basis alone.

III. This Case Presents Important Issues.

A. The Ninth Circuit's Decision Will Impact Institutions and Individuals Throughout The State Of Nevada.

Petitioners are not the only Nevada citizens who will be affected by the Ninth Circuit's decision to strike the Nevada Due Process Statute. The Statute provides minimum procedural due process to *any* Nevada citizen investigated and prosecuted in the listed administrative proceedings. The large number of affected Nevada citizens include the approximately 11,714 students and 1,000 employees at the University of Nevada, Reno, the 19,504 students and 1,870 employees at the University of Nevada, Las Vegas, and the untold thousands of alumni or "boosters" of Nevada college athletics.

B. The Ninth Circuit's Decision Will Impact The Validity Of Similar Statutes Enacted In Other States.

The impact of the Ninth Circuit's decision will be felt even outside Nevada's borders. Numerous other states have either enacted or are considering enacting legislation similar to the Nevada Due Process Statute. In 1990, the Nebraska legislature adopted the Nebraska Collegiate Athletic Association Procedures Act. Neb. Rev. Stat. §§ 85-1201, *et seq.* (1990). In 1991, Florida enacted its Collegiate Athletic Association Compliance Enforcement Procedures Act, Fla. Stat. Ann. §§ 240.5339, *et seq.* (West 1991), and the Illinois legislature adopted the Collegiate Athletic Association Compliance Enforcement Procedures Act. Ill. Rev. Stat. ch. 144, para. 2902, *et seq.* (1991). Furthermore, due process statutes have been introduced in California, Iowa, Kansas, South Carolina, and New York. The Ninth Circuit's decision clearly calls into question the validity of these other statutes, and the rationale threatens the ability of any state to enact *any* due process statute.

This Court has on at least two occasions granted a petition for certiorari to review a lower court's decision which declared a state statute unconstitutional which was similar to other state statutes. In the case of *New York v. Ferber*, 458 U.S. 747, 751-2, 102 S. Ct. 3348, 3351-52, 173 L. Ed. 2d 1113 (1982), the New York Court of Appeals declared unconstitutional a New York statute which prohibited the distribution of material depicting children engaged in sexual conduct regardless of whether that material was obscene. Nineteen other states had enacted similar statutes. *Ferber*, 458 U.S. at 749 n.2, 102 S. Ct. at 3351 n.2. In *New York v. O'Neill*, 359 U.S. 1, 3, 79 S. Ct. 564, 567, 3 L. Ed. 2d 585 (1959), the Supreme Court of Florida held unconstitutional a state statute which permitted the Florida courts to order a witness to attend a criminal proceedings in another state. Similar statutes had been enacted in forty-two other states and in Puerto Rico. In both the *Ferber* and *O'Neill* cases, this Court was persuaded to review the lower courts' decisions because these decisions not only declared New York and Florida's statutes unconstitutional, but also called into question the constitutionality of other comparable state statutes.

The Ninth Circuit's decision also calls into question all of the other state statutes which attempt to provide minimum procedural due process to their citizens. Because this case has such far reaching consequences beyond the interests of one state and its citizens, this Court should grant the petition.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

GILES & BURKHALTER

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APPENDIX A

FOR PUBLICATION

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

THE NATIONAL COLLEGIATE ATHLETIC ASSOCIATION, an unincorporated association,
Plaintiff,

MICHAEL ALSUP,
Intervenor,

and

JERRY TARKANIAN, and LOIS TARKANIAN,
Counter-Claimants-Appellants,

v.

ROBERT F. MILLER, Governor, State of Nevada, et al.,
Defendants,

and

THE NATIONAL COLLEGIATE ATHLETIC ASSOCIATION, WALTER BYERS, S. DAVID BERST, and ROBERT STOUP,
Counter-Defendants-Appellees.

No. 92-16184

D.C. No.
CV-91-526-HDM

THE NATIONAL COLLEGIATE ATHLETIC ASSOCIATION, an unincorporated association,
Plaintiff-Appellee,

v.

ROBERT F. MILLER, Governor, State of Nevada, et al.,
Defendants,

and

TIM GRGURICH; RONALD GANULIN,
Defendants-Appellants.

No. 92-16227
D.C. No.
CV-91-526-HDM

THE NATIONAL COLLEGIATE ATHLETIC ASSOCIATION, an unincorporated association,
Plaintiff,

and

SHELLEY FISCHER,
Counter-Claimant-Appellant,

v.

ROBERT F. MILLER, Governor, State of Nevada, et al.,
Defendants,

and

THE NATIONAL COLLEGIATE ATHLETIC ASSOCIATION, WALTER BYERS, S. DAVID BERST, and ROBERT STOUP,
Counter-Defendants-Appellees.

No. 92-16234
D.C. No.
CV-91-526-HDM

OPINION

Appeal from the United States District Court
for the District of Nevada
Howard D. McKibben, District Judge, Presiding

Argued and Submitted
October 5, 1993—San Francisco, California

Filed November 23, 1993

Before: Thomas Tang, Stephen S. Trott, and Ferdinand F. Fernandez, Circuit Judges.

Opinion by Judge Fernandez

COUNSEL

Alton G. Burkhalter, Giles & Burkhalter, Santa Ana, California, for defendant-appellant Jerry Tarkanian.

Roy E. Smith, Galatz, Earl, Catalano & Smith, Las Vegas, Nevada, and Charles E. Thompson, Thompson & Harper, Las Vegas, Nevada, for defendants-appellants Tim Grgurich and Ronald Ganulin.

Keith E. Galliher, Jr., Las Vegas, Nevada, for defendant-appellant Shelley Fischer.

John J. Kitchin, Swanson, Midgley, Gangwere, Clarke & Kitchin, Kansas City, Missouri, and James S. Beasley, Beasley, Holden & Brooks, Reno, Nevada, for plaintiff-appellee The National Collegiate Athletic Association.

OPINION

FERNANDEZ, Circuit Judge:

Jerry Tarkanian, Tim Grgurich, Ronald Ganulin, and Shel-

ley Fischer appeal the district court's order declaring that the provisions of Nevada Revised Statutes §§ 398.155 – 398.255[1] ("the Statute"), which impose certain requirements on interstate national collegiate athletic associations, violate Article I, Section 8, Clause 3 (the Commerce Clause) and Article I, Section 10 (the Contract Clause) of the United States Constitution. The district court granted the declaratory judgment and enjoined appellants from taking any action to seek protection under the Statute.[2] We affirm.

BACKGROUND

The National Collegiate Athletic Association ("NCAA") is a voluntary, unincorporated association of 1,056 members, including four-year colleges and universities, conferences, associations, and other educational institutions. Members of the NCAA are located in each of the United States.

Among the purposes of the NCAA are these: 1) "to initiate, stimulate and improve intercollegiate athletics programs for student-athletes;" 2) "to uphold the principle of institutional control of, and responsibility for, all intercollegiate sports in conformity with the constitution and bylaws of this Association;" 3) "to encourage its members to adopt eligibility rules to comply with satisfactory standards of scholarship, sportsmanship and amateurism;" 4) "to formulate . . . and publish rules of play governing intercollegiate athletics;" 5) "to supervise the conduct of, and to establish eligibility standards for, regional and national athletics events;" 6) "to legislate, through bylaws or by resolutions of a Convention, upon any subject of general concern to the members related to the administration of intercollegiate athletics[;]" and 7) "to maintain intercollegiate athletics as an integral part of the educational program and the athlete as an integral part of the student body and, by so doing, retain a clear line of demarca-

[1]1991 Nev. Stat. ch. 55.

[2]*NCAA v. Miller*, 795 F. Supp. 1476 (D. Nev. 1992) (*Miller I*).

tion between intercollegiate athletics and professional sports." NCAA Const §§ 1.2 and 1.3.1. The Association is also entrusted with the responsibility of promoting the opportunity for competitive equity among its member institutions. *Id.* § 2.7.

At the annual convention, the member institutions of the NCAA enact legislation dealing with athlete recruiting, eligibility, financial aid, admissions, and other matters. All NCAA legislation must be adopted by a vote of the active members. *Id.* § 5.01.1. NCAA legislation consists of both substantive rules and a procedural enforcement program. As a condition of membership, each institution is obligated to apply and enforce all NCAA legislation related to its own athletic programs. *Id.* § 1.3.2. The NCAA Manual also specifically provides that: "the enforcement procedures of the Association shall be applied to an institution when it fails to fulfill this obligation." *Id.*; *see also NCAA v. Tarkanian*, 488 U.S. 179, 183, 109 S. Ct. 454, 457, 102 L. Ed. 2d 469 (1988).

Whenever an alleged rules violation is reported to the NCAA, the matter is handled pursuant to the enforcement program. The enforcement program is administered by the Committee on Infractions, which establishes investigation procedures that must later be approved by the NCAA Council and the full membership of the NCAA. The Manual details the procedures that must be followed in processing an infractions case. NCAA Bylaws 19, 32.

The first step in the process is for the enforcement staff to notify the institution in question that the NCAA is making a preliminary inquiry into the institution's athletics policies and practices. NCAA Bylaw 32.2.2.4. If the enforcement staff determines that a possible rule violation has occurred, it sends an official inquiry letter to the chief executive officer of the institution. The official inquiry must include a statement of the NCAA rule alleged to have been violated and the details of each separate allegation. The enforcement staff must also

provide the institution and other involved individuals with the names of the principals involved and the names, addresses and telephone numbers of any people contacted during the NCAA investigation. The institution is required to notify past or present staff members or prospective, past, or present student-athletes who may be affected by the charges that they have the opportunity to submit any information they desire to the Committee and that they and their personal legal counsel may appear before the Committee. The institution is also required to investigate the charges and to indicate whether it feels that the allegations are substantially correct. It may also submit written evidence to support its response to the official inquiry. *See* NCAA Bylaw 32.5.

After the institution has submitted its written response to the official inquiry in a case involving a major violation, the enforcement staff must "prepare a summary statement of the case that indicates the status of each allegation and identifies the individuals upon whom and the information upon which the staff will rely in presenting the case." The summary is presented to the Committee, the institution, and all other affected individuals before the Committee hearing. NCAA Bylaw 32.5.10(a). The institution and affected individuals and their legal counsel are permitted to review any memoranda or documents upon which the enforcement staff will rely in the presentation of its case, but only at the NCAA national office. NCAA Bylaw 32.5.10(b).

Prior to the Committee on Infractions hearing, prehearing conferences are held with the NCAA staff, the institution and all affected individuals and their legal counsel. At those meetings, the NCAA staff is required to provide all of the information upon which it intends to rely at the hearing. All involved parties review the relevant documents. Areas of factual dispute are identified. Unsupported allegations may be withdrawn and the institution and affected individuals can determine whether they need to conduct any further inter-

views in order to supplement their responses to the official inquiry. NCAA Bylaw 32.5.10(c).

The Committee on Infractions hearing consists of a detailed presentation of the case by the enforcement staff followed by a response from the institution and any affected individuals (or their legal representatives) who desire to respond. NCAA Bylaw 32.6.5. After the hearing, the Committee members privately make their determinations of fact, determine appropriate corrective action, if any, and prepare their written report. NCAA Bylaws 32.6.6, 32.7. The institution is entitled to appeal the Committee's findings of fact and any corrective action taken against it to the NCAA Council. NCAA Bylaw 32.9.

In 1991, the Nevada legislature enacted the Statute. Essentially, the Statute requires any national collegiate athletic association[3] to provide a Nevada institution, employee, student-athlete, or booster who is accused of a rules infraction with certain procedural due process protections during an enforcement proceeding in which sanctions may be imposed.[4]

[3]A national collegiate athletic association is defined as a "group of institutions in 40 or more states who are governed by the rules of the association relating to athletic competition." Nev. Rev. Stat. § 398.055.

[4]Specifically, the Statute requires an association to provide the accused with the procedural rights: 1) to a hearing after reasonable notice of the nature of the proceeding, the governing rules, and the factual basis for each alleged violation, Nev. Rev. Stat. § 398.155(1); 2) to be represented by counsel, *id.* § 398.155(2); 3) to confront and respond to all witnesses and evidence, *id.*; 4) to the exchange of all evidence 30 days before any proceeding, *id.* § 398.155(3); 5) to have all written statements signed under oath and notarized, *id.* § 398.155(4); 6) to have an official record kept of all proceedings, *id.* § 398.165; 7) to receive transcriptions of all oral statements upon request, *id.* § 398.175; 8) to exclude irrelevant evidence, *id.* § 398.185(1); 9) to have an impartial person presiding over the proceeding, *id.* § 398.195; 10) to have a decision rendered within a reasonable time, with findings of fact based upon substantial evidence in the record and supported by a preponderance of such evidence, *id.* § 398.205; and 11) to a judicial review under the Nevada Administrative Procedures Act, *id.* § 398.215.

Many of the procedures required by the Statute are not included in the NCAA enforcement program. For example, the NCAA does not provide the accused with the right to confront all witnesses, the right to have all written statements signed under oath and notarized, the right to have an official record kept of all proceedings, or the right to judicial review of a Committee decision.

The Statute provides that a state district court may enjoin any NCAA proceeding that violates the statutory provisions. Furthermore an aggrieved institution which raises a successful challenge under the Statute is entitled to costs, reasonable attorney's fees, and compensatory damages equal to "100 percent of the monetary loss per year or portion of a year which is suffered . . . as a result of a penalty imposed in violation of [the Statute]." Nev. Rev. Stat. § 398.245. Finally, the Statute prohibits an association from impairing the rights or privileges of membership of any institution as a consequence of any rights granted by sections 398.155 - 398.255. *Id.* § 398.235(3). Thus, the NCAA can not avoid complying with the Statute by simply expelling its Nevada members.

This action arose when appellants, who were charged with NCAA rules violations in a pending investigation of the University of Nevada, Las Vegas ("UNLV"), asserted their right to have the proceedings against them comply with the Statute. The NCAA filed a complaint for declaratory judgment and injunctive relief in which it sought a declaration that the Statute was unconstitutional because it violated the Commerce Clause and the Contract Clause.[5] The NCAA also sought an order enjoining the application of the Statute to the infractions proceeding. The district court found that the Statute violates both the Commerce Clause and the Contracts Clause and

[5]The NCAA also alleged violations of the First and Fourteenth Amendments. Neither of these claims was adjudicated by the district court and the parties have not discussed them in their briefs to this Court.

enjoined its application to the NCAA's proceeding against the appellants. This appeal ensued.

JURISDICTION AND STANDARD OF REVIEW

The district court had jurisdiction under 28 U.S.C. § 1331. We have jurisdiction under 28 U.S.C. § 1291.

A district court's ruling on the constitutionality of a state statute is reviewed de novo. *Polykoff v. Collins*, 816 F.2d 1326, 1335 (9th Cir. 1987). The same standard of review applies to a district court's interpretation of a statute or ruling on mixed questions of law and fact that implicate constitutional rights. *United States v. 50.50 Acres of Land*, 931 F.2d 1349, 1352 (9th Cir. 1991); *United States v. McConney*, 728 F.2d 1195, 1201 (9th Cir.) (en banc), *cert. denied*, 469 U.S. 824, 105 S. Ct. 101, 83 L. Ed. 2d 46 (1984).

DISCUSSION

[1] If either of the district court's determinations was correct, the Statute must fall. As we will demonstrate, the Statute cannot withstand Commerce Clause scrutiny. That being so, we need not and do not address the Contract Clause issue.

A. *Legal Standards*

The Supreme Court has outlined a two-tiered approach to analyzing state economic regulations under the Commerce Clause.

> When a state statute directly regulates or discriminates against interstate commerce, or when its effect is to favor in-state economic interests over out-of-state interests, we have generally struck down the statute without further inquiry. When, however, a statute has only indirect effects on interstate commerce and regulates evenhandedly, we have exam-

> ined whether the State's interest is legitimate and whether the burden on interstate commerce clearly exceeds the local benefits.

Healy v. Beer Institute, 491 U.S. 324, 337 n.14, 109 S. Ct. 2491, 2499 n.14, 105 L. Ed. 2d 275 (1989) (quoting *Brown-Forman Distillers Corp. v. New York State Liquor Auth.*, 476 U.S. 573, 579, 106 S. Ct. 2080, 2084, 90 L. Ed. 2d 552 (1986) (citations omitted in original)). Applying this test, we must first ask whether the Statute: 1) directly regulates interstate commerce; 2) discriminates against interstate commerce; or 3) favors in-state economic interests over out-of-state interests. If the Statute does any of these things, it violates the Commerce Clause per se, and we must strike it down without further inquiry. If we determine that the Statute has only indirect effects on interstate commerce and that it regulates even-handedly, then we must apply the balancing test. *See also Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142, 90 S. Ct. 844, 847, 25 L. Ed. 2d 174 (1970).

B. *The Statute Violates the Commerce Clause Per Se*

The district court held that the Statute does not violate the Commerce Clause per se because it does not directly discriminate against interstate commerce or favor in-state economic interests over out-of-state interests. *Miller I*, 795 F. Supp. at 1483. That holding was error because discrimination and economic protectionism are not the sole tests. The court should also have considered whether the Statute directly regulates interstate commerce.

[2] It is clear that the Statute is directed at interstate commerce and only interstate commerce. By its terms, it regulates only interstate organizations, *i.e.*, national collegiate athletic associations which have member institutions in 40 or more states. Nev. Rev. Stat. § 398.055. Moreover, courts have consistently held that the NCAA, which seems to be the only organization regulated by the Statute, is engaged in interstate

commerce in numerous ways. It markets interstate intercollegiate athletic competition. *See NCAA v. Board of Regents of Univ. of Okla.*, 468 U.S. 85, 101-02, 104 S. Ct. 2948, 2960, 82 L. Ed.2d 70 (1984) (finding by implication that NCAA was engaged in interstate commerce and was subject to antitrust regulation). The NCAA schedules events that call for transportation of teams across state lines and it governs nationwide amateur athlete recruiting and controls bids for lucrative national and regional television broadcasting of college athletics. *Justice v. NCAA*, 577 F. Supp. 356, 378 (D. Ariz. 1983); *accord Hennessey v. NCAA*, 564 F.2d 1136, 1150 (5th Cir. 1977). Thus, the Statute regulates only interstate organizations which are engaged in interstate commerce, and it does so directly. In fact, it applies no such panoply of procedural rights to voluntary organizations which operate wholly within the State of Nevada.

[3] The Statute would have a profound effect on the way the NCAA enforces its rules and regulates the integrity of its product. The district court found that in order for the NCAA to accomplish its goals, the "enforcement procedures must be applied even-handedly and uniformly on a national basis." *Miller I*, 795 F. Supp. at 1484. That finding is not only correct, but is also consistent with the Supreme Court's statement that the integrity of the NCAA's product cannot be preserved "except by mutual agreement; if an institution adopted [its own athlete eligibility regulations] unilaterally, its effectiveness as a competitor on the playing field might soon be destroyed." *Board of Regents of Univ. of Okla.*, 468 U.S. at 102, 104 S. Ct. at 2960.

[4] In order to avoid liability under the Statute, the NCAA would be forced to adopt Nevada's procedural rules for Nevada schools. Therefore, if the NCAA wished to have the uniform enforcement procedures that it needs to accomplish its fundamental goals and to simultaneously avoid liability under the Statute, it would have to apply Nevada's procedures to enforcement proceedings throughout the country.

[5] The practical requirement that the NCAA would have to use the Statute in enforcement proceedings in every state in the union runs afoul of the Commerce Clause in two ways. First, "a statute that directly controls commerce occurring wholly outside the boundaries of a State exceeds the inherent limits of the enacting State's authority and is invalid regardless of whether the statute's extraterritorial reach was intended by the legislature. The critical inquiry is whether the practical effect of the regulation is to control conduct beyond the boundaries of the State." *Healy*, 491 U.S. at 336, 109 S. Ct. at 2499.

[6] The Statute would force the NCAA to regulate the integrity of its product in every state according to Nevada's procedural rules. Thus, if a university in state X ("U of X") engaged in illicit practices while recruiting a high school quarterback from state Y, the NCAA would have to conduct its enforcement proceeding according to Nevada law in order to maintain uniformity in its rules. Nevada procedures do not allow the Committee on Infractions to consider some types of evidence, like hearsay and unsworn affidavits, that it can consider under the NCAA Bylaws. As a result, if its case against the U of X were based on unsworn affidavits from unavailable witnesses, the NCAA might not have enough admissible evidence to prove that there was a violation of the recruiting rules. The NCAA could be forced to allow the U of X to use an illegally recruited quarterback from state Y because it could not prove a rules violation under the strictures of Nevada law. In this way, the Statute could control the regulation of the integrity of a product in interstate commerce that occurs wholly outside Nevada's borders. That sort of extraterritorial effect is forbidden by the Commerce Clause.

[7] The Statute's extraterritorial reach also violates the Commerce Clause because of its potential interaction or conflict with similar statutes in other jurisdictions. "Generally speaking, the Commerce Clause protects against inconsistent legislation arising from the projection of one state regulatory

regime into the jurisdiction of another State." *Healy*, 491 U.S. at 336-37, 109 S. Ct. at 2499.

[8] Nevada is not the only state that has enacted or could enact legislation that establishes procedural rules for NCAA enforcement proceedings. Florida, Illinois, and Nebraska have also adopted due process statutes[6] and similar legislation has been introduced in five other states.[7] Those statutes could easily subject the NCAA to conflicting requirements. For example, suppose that state X required proof of an infraction beyond a reasonable doubt, while state Y only required clear and convincing evidence, and state Z required infractions to be proven by a preponderance of the evidence. Given that the NCAA must have uniform enforcement procedures in order to accomplish its fundamental goals, its operation would be disrupted because it could not possibly comply with all three statutes. Nor would it do to say that it need only comply with the most stringent burden of persuasion (beyond a reasonable doubt), for a state with a less stringent standard might well consider its standard a maximum as well as a minimum. The serious risk of inconsistent obligations wrought by the extraterritorial effect of the Statute demonstrates why it constitutes a per se violation of the Commerce Clause.

[9] Under *Brown-Forman*, 476 U.S. at 579, 106 S. Ct. at 2084, when a state law directly regulates interstate commerce, it can generally be struck down without further inquiry. The Statute directly regulates interstate commerce and runs afoul of the Commerce Clause both because it regulates a product in interstate commerce beyond Nevada's state boundaries, and

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[6]*See* Fla. Stat. Ann. §§ 240.5339-.5349 (Florida's Collegiate Athletic Association Compliance Enforcement Procedures Act); Ill. Rev. Stat. ch. 110 §§ 25/1-25/13 (Illinois' Collegiate Athletic Association Compliance Enforcement Procedures Act); Neb. Rev. Stat. §§ 85-1201 to -1210. (1990) (Nebraska Collegiate Athletic Association Procedures Act).

[7]The states are Kansas, Kentucky, Missouri, Ohio, South Carolina. Affidavit of Alton G. Burkhalter at 2, ¶ 5.

because it puts the NCAA, and whatever other national collegiate athletic associations may exist, in jeopardy of being subjected to inconsistent legislation arising from the injection of Nevada's regulatory scheme into the jurisdiction of other states. Because the Statute violates the Commerce Clause per se, we need not balance the burden on interstate commerce against the local benefit derived from the Statute.[8]

C. *The Entire Statute Must Fall*

"[A] court should refrain from invalidating more of [a] statute than is necessary." *Regan v. Time, Inc.*, 468 U.S. 641, 652, 104 S. Ct. 3262, 3269, 82 L. Ed. 2d 487 (1984). When a statute contains unobjectionable provisions that are separable from those found to be unconstitutional, a court reviewing the statute should maintain the statute in so far as it is valid. *Alaska Airlines, Inc. v. Brock*, 480 U.S. 678, 684, 107 S. Ct. 1476, 1479, 94 L. Ed. 2d 661 (1987). The standard for determining the severability of an unconstitutional provision is: "Unless it is evident that the Legislature would not have enacted those provisions which are within its power, independently of that which is not, the invalid part may be dropped if what is left is fully operative as a law." *Buckley v. Valeo*, 424 U.S. 1, 108, 96 S. Ct. 612, 677, 46 L. Ed. 2d 659 (1976) (per curiam) (quoting *Champlin Refining Co. v. Corporation Comm'n*, 286 U.S. 210, 234, 52 S. Ct. 559, 565, 76 L. Ed. 1062 (1932)); *see Board of Natural Resources v. Brown*, 992 F.2d 937, 947-49 (9th Cir. 1993).

The Nevada legislature enacted the Statute in order to regulate interstate commerce. If we were to invalidate all of the provisions of the Statute that directly regulate interstate com-

[8]If balancing were necessary or appropriate, the balance struck by the learned trial judge was exactly right. *See Miller I*, 795 F. Supp. at 1483-85. If the NCAA is suffering from a procedural disease, Nevada's attempted cure is as likely to destroy the patient as it is to banish the disease. It is not an example of permissible praxis.

merce, nothing of consequence would remain. Thus, our inquiry into the possibility of severance must end almost before it begins because no provision of the Statute can be characterized as "unobjectionable." The entire Statute and all of its provisions violate the Commerce Clause because they impermissibly regulate interstate commerce.

CONCLUSION

We appreciate Nevada's interest in assuring that its citizens and institutions will be treated fairly. However, the authority it seeks here goes to the heart of the NCAA and threatens to tear that heart out. Consistency among members must exist if an organization of this type is to thrive, or even exist. Procedural changes at the border of every state would as surely disrupt the NCAA as changes in train length at each state's border would disrupt a railroad. *See Southern Pac. Co. v. Arizona*, 325 U.S. 761, 65 S. Ct. 1515, 89 L. Ed. 1915 (1945). It takes no extended lucubration to discover that. If the procedures of the NCAA are "to be regulated at all, national uniformity in the regulation adopted, such as only Congress can prescribe, is practically indispensable . . . ." *Id.* at 771, 65 S. Ct. 1521. In short, when weighed against the Constitution, the Statute must be found wanting. It violates the Commerce Clause.

AFFIRMED.

APPENDIX B

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

THE NATIONAL COLLEGIATE
ATHLETIC ASSOCIATION,
Plaintiff(s),

v.

ROBERT F. MILLER, GOVERNOR,
et al.,
Defendant(s).

CASE NUMBER: CV-N-91-526-HDM

JUDGMENT IN A CIVIL CASE

☐ **Jury Verdict.** This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

☒ **Decision by Court.** This action came to be considered by the Court. The issues have been considered and a decision has been rendered.

IT IS ORDERED AND ADJUDGED

Judgment is hereby entered in favor of Plaintiff and against Defendants, pursuant to Order of the Court.

[SEAL]

June 5, 1992
Date

CAROL C. FITZGERALD
Clerk

BERTIE HEADLEY
(By) Deputy Clerk

ENTERED & SERVED

June 5, 1992

CLERK, U.S. DISTRICT COURT
DISTRICT OF NEVADA
BY BERTIE HEADLEY DEPUTY

UNITED STATES DISTRICT COURT

DISTRICT OF NEVADA

THE NATIONAL COLLEGIATE ATHLETIC ASSOCIATION, an unincorporated association,

Plaintiff,

vs.

ROBERT F. MILLER, GOVERNOR, STATE OF NEVADA; CAROLYN SPARKS; JAMES EARDLEY; LONNIE HAMMARGREN; SHELLEY BERKLEY; JILL DERBY; JOSEPH FOLEY; JUNE WHITLEY; DANIEL KLAICH and DOROTHY GALLAGHER, members of the Board of Regents of the University of Nevada; RONALD GANULIN; TIM GRGURICH; JERRY TARKANIAN; and SHELLY FISCHER;

Defendants.

_____/

CV-N-91-526-HDM

MEMORANDUM DECISION AND ORDER

The plaintiff, National Collegiate Athletic Association ("NCAA"), filed this action against the defendants, Robert Miller, Ronald Ganulin, Tim Grgurich, Jerry Tarkanian, and Shelley Fischer. Defendants Ganulin, Grgurich, Tarkanian and Fischer, are present and former employees of the University of Nevada Las Vegas ("UNLV"). The other defendants, joined by order of the court, are members of the University of Nevada Board of Regents. Defendant Robert Miller, Governor of Nevada, was dismissed from this action by previous order of the court.

The NCAA seeks an order of the court enjoining the application of Nev. Rev. Stat. §§ 398.155 - 398.255 to an infractions case involving the NCAA, UNLV, Ronald Ganulin, Tim Grgurich, Jerry Tarkanian, and Shelley Fischer.

The NCAA also seeks a declaratory judgment. pursuant to 28 U.S.C. § 2201 and 42 U.S.C. § 1983, that Nev. Rev. Stat. §§ 398.155 - 398.255 is void because: (1) the statute imposes a direct burden on interstate commerce in violation of Article I, Section 8, Clause 3 of the United States Constitution; (2) the statute substantially impairs existing contractual rights and obligations running between the NCAA and its members in violation of the Contract Clause of Article I, Section 10 of the Constitution; (3) the statute arbitrarily deprives the NCAA and its members of the right to freely associate with each other to maintain their intercollegiate athletics programs in violation of the First

Amendment; and (4) the statute contains provisions which are vague and overbroad in violation of the Due Process Clause under the Fourteenth Amendment.

This court has jurisdiction pursuant to 28 U.S.C. §§ 1331 and 1343(a)(3) and (4), 28 U.S.C. §§ 2201 and 2202, and 42 U.S.C. § 1983.

BACKGROUND

The NCAA is a voluntary, unincorporated association of colleges, universities, and affiliated conferences and organizations. The NCAA consists of approximately one thousand, fifty-six (1,056) members, including most public and private universities and four-year colleges. Its members conduct major athletics programs in all fifty (50) states. The University of Nevada, Reno ("UNR"), and UNLV are members of the NCAA.

A basic purpose of the NCAA is to "maintain intercollegiate athletics as an integral part of the educational program" and to "retain a clear line of demarcation between intercollegiate athletics and professional sports." NCAA Const. art. 1.3.1. The policies that govern the recruitment, admission, financial aid, and eligibility of students who compete in intercollegiate athletics are determined by the NCAA member institutions at their annual conventions. The NCAA constitution, bylaws, and other governing rules and regulations are approved by a vote of the members.

By joining the NCAA, each member institution agrees to comply with and enforce the rules of the NCAA. NCAA Const. art. 2.5.1. All staff, student athletes, and other individuals representing the member institution's

athletics interests must also comply with these rules. NCAA Const. art. 2.5.1. The NCAA enforcement procedures are applied to a member institution when that institution fails to fulfill its obligations to apply and enforce NCAA rules. NCAA Const. art. 1.3.2.

The enforcement programs are administered by the NCAA Committee on Infractions. This committee supervises an investigative staff, makes factual determinations relating to any possible rules violations, and imposes appropriate penalties on member institutions found to be in violation of NCAA rules. In addition, the NCAA bylaws provide for a mechanism for individual member institutions to monitor their own athletics programs. This aspect of the enforcement program is designed to permit member institutions to police their own intercollegiate athletics programs and to take voluntary corrective action.

When allegations of a rule violation come to the attention of the NCAA enforcement staff, a notice of preliminary inquiry is delivered to the member institution involved. If, after investigation, the NCAA staff determines that a possible rule violation has occurred, the institution is advised and an official inquiry is commenced. The institution is requested to investigate the allegations, and the institution then reports its findings to the Committee on Infractions and suggests appropriate corrective action.

A pre-hearing conference is held with the institution, the affected individuals, and the NCAA staff. At the pre-hearing conference, the NCAA staff is required to advise the parties of information it intends to use to support the allegations in the official inquiry before the committee, and the parties are permitted to review memoranda and

documents relating to the alleged infractions prior to the official inquiry. The institution and the affected parties are permitted to appear at the official hearing before the Committee on Infractions. There, those involved may contest the allegations and present arguments and information to the committee. However, the NCAA has no power to issue subpoenas or to compel a witness to appear or give sworn testimony.

After the official hearing and private deliberation, the committee issues written findings of violations and recommends corrective action. The NCAA does not take corrective action against individual representatives or student athletes of the institution. Instead, the NCAA takes corrective action against the member institution itself.

Appeals may be taken from the committee's findings to the NCAA council. Finally, the NCAA rules provide for a further appeal to the full membership of the NCAA.

In this case, the NCAA received information of possible rule violations at UNLV and, on December 17, 1990, sent a notice of official inquiry to UNLV describing the possible violations. Between December 17; 1990, and April, 1991, the NCAA staff and UNLV conducted separate investigations of the UNLV intercollegiate basketball program. Witnesses were interviewed, information was exchanged, and documents were secured in preparation for the official hearing before the Committee on Infractions. On July 19, 1991, the NCAA notified UNLV that a prehearing conference would be held on September 9, 1991, and that the official hearing was scheduled for September 27-29, 1991.

Meanwhile, on July 11, 1991, Defendants Tim Grgurich and Ron Ganulin, through written correspondence, demanded that the NCAA abandon its existing procedure for conducting the investigation and holding the official hearing. Rather, these defendants insisted that the NCAA conduct the investigation and hearing in complete accord with Nev. Rev. Stat. §§ 398.155 - 398.255, enacted into law on April 8, 1991. On August 5, 1991, and August 15, 1991, respectively, Defendants Jerry Tarkanian and Shelley Fischer made similar written demands on the NCAA for compliance with the new Nevada law.

These defendants advised the NCAA that any appearance by them at a hearing before the NCAA Committee on Infractions is conditioned upon the NCAA complying with certain provision of Nev. Rev. Stat. §§ 398.155 - 398.255. These demands included:

(1) that at least thirty (30) days prior to the prehearing conference the NCAA give each defendant copies of all documents the NCAA intends to rely upon or use in any manner;

(2) that each defendant be given the opportunity to confront all witnesses;

(3) that the NCAA provide the defendants all exculpatory statements obtained by the NCAA;

(4) that the Committee on Infractions is not impartial and that an independent and

impartial entity be selected to adjudicate the facts and corrective actions;

(5) that all proceedings of the NCAA hearing be open to the public, recorded and transcribed; and

(6) that all other provision of Nev. Rev. Stat. §§ 398-155 - 398-255 be followed.

The NCAA responded that it could not comply with the defendants' requests without violating the NCAA's substantive and procedural rules applicable to all NCAA member institutions and that it could not apply those substantive and procedural rules uniformly in all enforcement proceedings if it were to comply with the demands of the defendants in this case. Thereafter, the NCAA filed this action for declaratory and injunctive relief.

ABSTENTION

Defendants first contend that this court should abstain from considering the federal constitutional questions raised in the plaintiff's complaint and should allow this case to proceed in the state forum.

Where resolution of state law questions may obviate the need for a federal court to resolve federal constitutional issues, the federal court may abstain to allow the controversy to proceed in the first instance in a state forum. Railroad Comm'n of Texas v. Pullman Co., 312 U.S. 496 (1941). "[F]ederal courts should abstain from decision when difficult and unsettled questions of state law must be resolved before a substantial federal constitutional question

can be decided." Hawaii Housing Authority v. Midkiff, 467 U.S. 229, 236 (1984). However, abstention "is an extraordinary and narrow exception to the duty of a District Court to adjudicate a controversy properly before it." County of Allegheny v. Frank Mashuda Co., 360 U.S. 185, 188 (1959). Pullman abstention is limited to those cases in which the construction of a state statute by a state court could avoid or modify the federal constitutional question. Zwickler v. Koota, 389 U.S. 241, 248-49 (1967). Abstention is "the exception and not the rule." City of Houston v. Hill, 482 U.S. 451, 467 (1987).

The Ninth Circuit has instructed that abstention is appropriate only when (1) the case involves a sensitive area of social policy which federal courts ought not enter absent the lack of an alternative, (2) a definitive ruling by the state court would avoid the constitutional question, and (3) the issue of state law is doubtful. C.Y. Development Co. v. City of Redlands, 703 F.2d 375, 377 (9th Cir. 1983).

In this case, the prerequisites to abstention are not satisfied. First, this case does not call into question "a sensitive area of social policy." Nev. Rev. Stat. §§ 398-155 - 398.255 was not designed to address a "sensitive" social problem. Rather, the challenged state law is narrowly directed at and intended to modify the conduct of a single private entity, the NCAA. Thus, the court finds no sensitive area of social policy upon which this court might intrude unnecessarily by proceeding to the merits of this case.

Second, a judicial construction of the statute by a state court would not avoid the federal constitutional questions raised by the NCAA. This statute is relatively short and not overly complex. Resolution of state law issues

would not terminate the federal constitutional controversy. Accordingly, this court concludes that the Pullman abstention doctrine does not apply in this case.

THE COMMERCE CLAUSE

The NCAA contends in count one of its complaint that Nev. Rev. Stat. §§ 398-155 - 398.255 violates the Commerce Clause of the United States Constitution. Under Article I, Section 8, Clause 3 of the United States Constitution, Congress is granted the power "to regulate commerce . . . among the several states. . . ." Although the Commerce Clause is phrased as an affirmative grant of power to Congress, the Supreme Court has long recognized that "the Commerce Clause even without implementing legislation by Congress is a limitation upon the power of the States." Freeman v. Hewit, 329 U.S. 249, 252 (1946). This aspect of the Commerce Clause limits state interference with interstate commerce. See H.P. Hood & Sons, v. C. Chester Du Mond, 336 U.S. 525, 535 (1949).

In this case, the threshold inquiry is whether the regulatory activities of the NCAA involve interstate commerce for purposes of Commerce Clause protection in light of the educational objectives of the NCAA. A principal purpose of the NCAA is to promote amateurism in intercollegiate athletics and to ensure that athletics are an integral part of the academic process through the cooperative and collective efforts of the member institutions. Yet, as the Fifth Circuit observed, "[w]hile the participating athletics [sic] may be amateurs, intercollegiate athletics in its management is clearly business, and big business at that." Hennessey v. NCAA, 564 F.2d 1136, 1150 (5th Cir. 1977). The NCAA and its member institutions are "significantly

involved in interstate commerce in the conduct of the athletic programs." Id. at 1150; See also Banks v. NCAA, 746 F. Supp. 850, 857 (N.D. Ind. 1990). The record before this court amply supports these conclusions.

The NCAA conducts seventy-six (76) annual NCAA championship events throughout the United States involving member teams and individual student athletes from across the country. The games and tournaments scheduled by the NCAA necessitate the transportation of teams across state lines. In addition, the NCAA controls bids involving hundreds of millions of dollars for interstate television broadcasting of intercollegiate sports events. See Board of Regents of the University of Okla. v. NCAA, 546 F. Supp. 1276, 1289-92 (W.D. Okla. 1982). Finally, collegiate recruiting of perspective team members takes place on a national and even international scale and the NCAA strictly regulates this recruiting activity. As the Supreme Court has held in the context of an antitrust case involving the NCAA, the "product" marketed by the NCAA is intercollegiate competition. NCAA v. Board of Regents of the Univ. of Okla., 468 U.S. 85, 101 (1984).[1] Accordingly, the court

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[1] In NCAA v. Board of Regents of the Univ. of Okla., the Supreme Court stated that:

> What the NCAA and its member institutions market in this case is competition itself -- contests between competing institutions. Of course, this would be completely ineffective if there were no rules on which the competitors agree to create and define the competition to be marketed. A myriad of rules affecting such matters as the size of the field, the number of players on a team, and the extent to which physical violence is to be encouraged or prescribed, all

concludes that the national scope of the NCAA's activities are sufficient to establish the requisite interstate involvement under the Commerce Clause.

The court must next consider whether the statute violates the Commerce Clause. In Brown-Forman Distillers Corp. v. New York Liquor Auth., 476 U.S. 573 (1986), the Supreme Court, drawing from its earlier Commerce Clause decisions, articulated a two-tiered approach to be used when determining the validity of a state statute under the Commerce Clause. The Court instructed that "[w]hen the statute directly regulates or discriminates against interstate commerce, or when its effect is to favor in-state economic interests over out-of-state interests, . . . [the statute is] generally struck down . . . without further inquiry." Id. at

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must be agreed upon, and all restrain the manner in which the institutions compete. Moreover, the NCAA seeks to market a particular brand of football--college football. The identification of this "product" with an academic tradition differentiates college football from and makes it more popular than professional sports to which it might otherwise be comparable, such as, for example, minor league baseball. In order to preserve the character and quality of the "product," athletes must not be paid, must be required to attend class, and the like. And the integrity of the "product" cannot be preserved except by mutual agreement; if an institution adopted such restrictions unilaterally, its effectiveness as a competitor on the playing field might soon be destroyed. Thus, the NCAA plays a vital role in enabling college football to preserve its character, and as a result enables a product to be marketed which might otherwise be unavailable.

Id. at 101-102.

579. However, when "a statute has only indirect effects on interstate commerce and regulates evenhandedly, . . . [the court examines] whether the State's interest is legitimate and whether the burden on interstate commerce clearly exceeds the local benefits." Id. at 579; Pike v. Bruce Church, Inc., 397 U.S. 137, 142 (1970).

Initially, therefore, the court must consider whether the Nevada law directly discriminates against interstate commerce or amounts to "economic protectionism." If so, the statute must be considered per se invalid under the Commerce Clause. City of Philadelphia v. New Jersey, 437 U.S. 617, 623-24 (1978); Evergreen Waste Sys. v. Metro. Serv. Dist., 820 F.2d 1482 (9th Cir. 1987); Valley Bank of Nev. v. Plus Systems, Inc., 914 F.2d 1186, 1194 (9th Cir.1990). In Evergreen, the Ninth Circuit upheld a local ordinance against a Commerce Clause challenge that proscribed the use of a certain landfill by those outside the metropolitan service district. In ruling that the ordinance was not per se invalid, the court stated that the Oregon law did not "fit the Court's paradigm of a per se violation: one that overtly blocks the flow of interstate commerce at a State's borders." Id. at 1488.

In this case, Nev. Rev. Stat. §§ 398.155 - 398.255 also does not fit the Supreme Court's model of a state statute which is per se invalid under the Commerce Clause. The challenged statute seeks to impose certain minimum "due process" procedural standards on the NCAA when the NCAA is investigating a Nevada NCAA member institution. The statute does not facially or directly discriminate against interstate commerce, nor does it sound of economic protectionism. Further, the statute's effect on interstate commerce is only indirect; that is, it does not overtly thwart

or block the NCAA's relationship with the Nevada member institutions or its relationship with member institutions in other states. Accordingly, the court concludes that Nev. Rev. Stat. §§ 398.155 - 398.255 is not per se invalid under the Commerce Clause.

Next, the court turns to an analysis of the statute under the "balancing" approach. Under this approach the court must first identify the state's interests in its legislation, ensure that those interests are legitimate, and then determine whether the state law imposes an excessive burden on interstate commerce in relation to those legitimate interests. Valley Bank of Nev. v. Plus Sys, Inc., 914 F.2d 1186, 1194 (9th Cir. 1990).

Defendants contend that the stimulus for the legislation is a concern that coach Tarkanian and the other defendant coaches will not receive a fair hearing consistent with notions of due process and fundamental fairness if the existing NCAA rules and procedures are applied in the investigative and hearing process. According to the defendants, the public purpose to be served by the enactment of the statute is to afford basic due process safeguards to the careers, livelihoods, and reputations of all Nevadans, including students and employees of Nevada NCAA member institutions, the alumni of these institutions, and the fans and boosters of Nevada intercollegiate sports. While these are narrowly tailored interests, they are, nevertheless, matters of legitimate local public interest. This conclusion, however, does not end the inquiry.

Even though a state statute addresses an area of legitimate state concern, it may still violate the Commerce Clause if it imposes an improper burden on interstate

commerce. The state statute must not be "excessive in relation to the local interests served by the statute." Edgar v. Mite Corp., 457 U.S. 624, 643 (1982).

The NCAA persuasively argues that its ability to accomplish its goals of scholarship, sportsmanship, and amateurism depends to a substantial degree on the creation of nationally uniform rules under which teams can compete on an equal basis. In order to satisfactorily achieve these goals, the NCAA's enforcement procedures must be applied even-handedly and uniformly on a national basis.

The Nevada statute, however, mandates procedures which are both substantially different from those contained in the NCAA bylaws and significantly burdensome on the NCAA's objective of maintaining a "level playing field" within intercollegiate athletics. For example, Section 398.155(2) of the statute provides that "[a] party to a proceeding . . . is entitled to confront and respond to all witnesses and evidence related to the allegation against him . . . ." Yet, the NCAA bylaws contain no comparable provision because the NCAA lacks subpoena power. Thus, since the NCAA does not have the ability to subpoena witnesses or otherwise require their cooperation, an infractions proceeding could not practicably be processed in compliance with the provisions of the Nevada statute.

In addition, Nev. Rev. Stat. § 398-195 requires that the hearings be conducted by an "impartial" hearing officer. However, under existing NCAA rules, only the membership convened at conventions may authorize someone other than the Committee on Infractions to conduct an infractions

hearing.[2] Therefore, the NCAA would be unable to comply with this provision of the Nevada law absent membership approval at a convention.

Finally, Nev. Rev. Stat. § 398.235(2) precludes the NCAA from expelling its Nevada institutions if those institutions refuse to comply with the provisions of the bylaws and constitution of the NCAA which are in conflict with the statute. This provision and similar provisions in other states would strip the NCAA of the authority to freely adopt its own procedural regulations. Because the NCAA enforcement proceedings would clearly be paralyzed by these procedural requirements, the NCAA would likely be reluctant to use its resources to enforce rules evenhandedly in the several venues in this country.[3]

A statutes effect beyond the enacting state's borders is also relevant in balancing the affected interests. The court must closely scrutinize a statute which controls commerce outside its borders. See Edgar v. Mite Corp., 457 U.S. 624 (1982); Brown-Forman Distillers v. New York Liquor Auth., 476 U.S. 573 (1986); Healy v. Beer Ins., Inc., 491 U.S. 324 (1989). An extraterritorial regulation exceeds the inherent limits of the enacting state's authority and is invalid regardless of whether the statute's extraterritorial reach was intended by the legislature. Edgar v. Mite Corp., 457 U.S. 624, 642 (1982). In Edgar, the Supreme Court held that the state statute at issue failed the balancing prong of the Pike test precisely because the "most obvious burden the Illinois Act imposes on interstate commerce arises from the statute's

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[2] See Berst Deposition, pp. 76-77.

[3] See Wright Affidavit, para. 12.

previously described nationwide reach . . . . " Edgar, 457 U.S. at 643.

Here, the extraterritorial effect of the Nevada statute is substantial. It severely restricts the NCAA from establishing uniform rules to govern and enforce interstate collegiate practices associated with intercollegiate athletics. The likely practical effect of the statute would be to compel the NCAA to adopt the procedural rules enacted by the Nevada Legislature, thereby allowing the Nevada Legislature to effectively dictate enforcement proceedings in states other than Nevada. Further, "the practical effect of the statute must be evaluated by considering the consequences of the statute itself, but also in considering how the challenged statute may interact with the legitimate regulatory schemes of other states and what effect would arise if not one, but many or every, state adopted similar legislation." Healy, 491 U.S. at 336. Here, as the record reflects, a strong possibility exists that other states will adopt legislation inconsistent with the Nevada statute, thus precluding the NCAA from having a uniform rule and procedural basis for conducting its investigation and review of member institutions.[4]

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[4] In South-Central Timber Dev., Inc. v. Wunnicke, 467 U.S. 82 (1984), the Supreme Court expressed its concern regarding a state statute which has extraterritorial reach:

> Unrepresented interests will often bear the brunt of regulations imposed by one State having a significant effect on persons or operations in other States. Thus, "when the regulation is of such a character that its burden falls principally upon those without the state, legislative action is not likely to be subjected to those political restraints which are

While the concerns the Nevada law is designed to address are legitimate, and while similar concerns have been expressed by the legislatures of other states,[5] any narrow interests the State of Nevada may have in imposing the requirements of Nev. Rev. Stat. §§ 398.155 - 398.255 for the protection of institutions and individuals residing in Nevada is outweighed by the general harm to the uniform enforcement of regulations by the NCAA and its member institutions throughout the country. Nev. Rev. Stat. §§ 398.155 - 398.255 effectively invalidates the NCAA's system of internal governance and enforcement and imposes procedural requirements with which the NCAA cannot comply.

Such a finding, of course, does not preclude the NCAA member institutions, including the Nevada institutions, from securing desired changes in the NCAA bylaws which regulate the investigative and enforcement procedures.

> normally exerted on legislation where it affects adversely some interests within the state." On the other hand, when Congress acts, all segments of the country are represented, and there is significantly less danger that one State will be in a position to exploit others.

Id. at 92 (citations omitted).

[5] To date four states have enacted legislation directed to the NCAA enforcement proceedings. These states are Nebraska, Illinois, Florida, and Nevada. See Fla. Stat. §§ 240.5339 - 240-5349 (1991); Ill. Ann. Stat., ch. 144 ¶¶ 2901 - 2913 (Smith-Hurd 1991); Neb. Rev. Stat. §§ 85-1201 - 85-1210 (1990). The states of Kansas, Ohio, Missouri, South Carolina, and Kentucky are considering similar legislation. In addition, the NCAA itself is taking steps to modify its procedural system of internal governance.

Therefore, the court concludes that applying the provisions of Nev. Rev. Stat. §§ 398.155 - 398.255 to the pending infractions case involving UNLV and the individual defendants violates Article I, Section 8, Clause 3 of the United States Constitution.

THE CONTRACT CLAUSE

The NCAA asserts under count four of its complaint that Nev. Rev. Stat. §§ 398.155 - 398.255 substantially impairs existing contractual relations between itself and the Nevada member institutions in violation of the Contract Clause of Article I, Section 10 of the United States Constitution. The Contract Clause provides that "[n]o State shall . . . pass any . . . Law impairing the Obligation of Contracts . . . ."

Although the language of the Contract Clause appears absolute, the Supreme Court has long-recognized that a literal construction of the Clause would be "destructive of the public interest by depriving the State of its prerogative of self-protection." W.B. Worthen Co. v. Thomas, 292 U.S. 426, 433 (1934). A proper application of the Contracts Clause takes into account both the degree of contract impairment and the nature and extent of the State's interest underlying the challenged state law. See Allied Structural Steel Co. v. Spannaus, 438 U.S. 234 (1978).

Analysis of a Contract Clause claim proceeds in two steps. First, the court must determine whether the state law "substantially impairs the contractual relationship." General Motors Corp. v. Romein, 112 S.Ct. 1105, 1109 (1992); In

re LaFortune, 652 F.2d 842, 846 (9th Cir. 1981). This inquiry involves three components: whether there is a contractual relationship; whether a change in law impairs that contractual relationship; and whether the impairment is substantial. General Motors, 112 S.Ct. at 1109. If the impairment is minimal, the inquiry ends and the state law is allowed to stand.

Second, if the impairment is substantial, then the court must decide whether the degree of that impairment is both "reasonable and necessary to achieve a valid state interest." United States Trust Co. of New York v. New Jersey, 431 U.S. 1, 25 (1977); Continental Ill. Nat'l Bank and Trust Co. of Chicago v. State of Wash., 696 F.2d 692, 701 (9th Cir. 1983).

The threshold issue then is whether a contractual relationship existed between the Nevada member institutions and the NCAA prior to the passage of Nev. Rev. Stat. §§ 398.155 - 398.255. This question is governed by federal law. State of Nevada Employees Assoc., Inc. v. Keating, 903 F.2d 1223, 1227 (9th Cir. 1990). The existence of a conventional contract, signed by both parties, is not a predicate to the application of Contract Clause review. See United States Trust Co. of New York v. New Jersey, 431 U.S. 1 (1977)(actionable Contract Clause claim based solely on a contractual relationship created by statute).

In this case, UNLV became a member of the NCAA in 1958. UNR became a member in 1965. In exchange for the benefits and privileges that flowed from membership in the NCAA, these institutions agreed to abide by the NCAA's "Conditions and Obligations of Membership" as expressed in the NCAA Constitution, including "the

enforcement procedures of the Association." NCAA Const. art. 1.3.2. Therefore, the record establishes that the NCAA and the Nevada NCAA member institutions have a contractual relationship sufficient to trigger review under the Contract Clause.[6]

The court next turns to the question of whether Nev. Rev. Stat. §§ 398.155 - 398.255 impairs the obligations under this contractual relationship and, if so, whether the impairment is substantial. Total destruction of contractual expectations is not necessary for a finding of substantial impairment. Energy Reserves Group, Inc. v. Kansas Power & Light Co., 459 U.S. 400, 411 (1983).

The primary purpose of the NCAA, as set forth in detail in the discussion of the Commerce Clause, is to promote amateur intercollegiate athletics and to ensure that intercollegiate competition takes place on a level and fair playing field. To achieve these goals, the NCAA has promulgated certain substantive rules and regulations relating to, among other things, recruiting, academic eligibility and rules of play. Every NCAA member has voluntarily and contractually agreed to abide by these rules and regulations. If all the members were not bound by these agreed upon rules and regulations, the effectiveness of the NCAA in

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[6] Indeed, the legislative findings underlying the very law being challenged acknowledges the contractual nature of the relationship between the NCAA and member institutions: "The legislature finds that: . . . Member institutions must agree contractually to administer their athletic programs in conformance with the rules of national collegiate athletic associations; . . ." 1991 Nev. Stat. ch. 55, § 1; see Nev. Rev. Stat. § 398-155, Reviser's Note.

attaining national uniformity in compliance with these rules and regulations would be severely restricted.

The defendants contend that the Nevada law does not modify or alter the substantive requirements that bind NCAA member institutions. The statute, instead, modifies the process by which the NCAA conducts investigations or alleged substantive violations by its membership by providing for certain "minimum" procedural standards.

However, the substantive effect of these statutory provisions is significant. Investigative and enforcement proceedings, followed by sanctions if warranted, are an important component in the NCAA's ongoing effort to foster fair play in intercollegiate athletics. Yet, as the record reflects, and as the court has discussed in depth under the Commerce Clause analysis, the NCAA cannot comply with certain procedures mandated by the statute in carrying out its investigations of alleged NCAA violations.[7] In addition, under the Nevada statute, the NCAA would face substantial monetary sanctions if it fails to employ these procedural requirements when investigating Nevada member institutions. Thus, enforcement proceedings against Nevada member institutions are effectively precluded, or severely restricted, thereby allowing Nevada institutions to gain an unfair competitive advantage over other members. This result is both inconsistent with the core purpose of the

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[7] For instance, under Nev. Rev. Stat. § 398.155, a party under investigation is "entitled to confront and respond to all witnesses and evidence related to the allegations against him . . . ." Yet, unlike a court of law, the NCAA does not possess subpoena power to compel appearance of those witnesses and evidence.

NCAA and indirectly allows Nevada institutions to circumvent the central substantive requirements it contractually agreed to honor. In this court's view, the provisions of Nev. Rev. Stat. §§ 398.155 and 398.255, when considered as a whole, substantially impair the contractual relationship between Nevada member institutions and the NCAA.

The final issue is whether the degree of impairment is both "reasonable and necessary to achieve a valid state interest," United States Trust Co. of New York v. New Jersey, 431 U.S. at 25. The Supreme Court has held that the nature of the contractual relationship involved determines the standard of review. If the challenged state law is alleged to have impaired a contractual relationship involving only private parties, the court should willingly defer to legislative judgment regarding the reasonableness and the necessity of the state law. Allied Structural Steel Co. v. Spannaus, 438 U.S. 235, 243 n.15 (1978). Conversely, when the state itself is a party to the contract, less deference is accorded to the legislative assessment of reasonableness and necessity. United States Trust Co. of New York v. New Jersey, 431 U.S. at 26. The court must evaluate with "particular scrutiny" legislative modification of public contracts "because the State's self-interests is at stake." Id. at 25. Further, the severity of the impairment measures the height of the hurdle the state legislation must clear. Allied Structural Steel Co., 438 U.S. at 244-45.

In this case, UNLV and UNR are parties to the contracts with the NCAA. Under Nevada law, these academic institutions are considered arms of the Nevada State Government. See Nev. Rev. Stat. Ann. §§ 396.010-396-020 and accompanying annotations. The contractual relationship between the NCAA and the Nevada member

institutions is public in nature, and the court must, therefore, closely scrutinize the statutory modifications of the subject contracts. "Complete deference to a legislative assessment of reasonableness and necessity is not appropriate" in the present case. See United States Trust Co., 431 U.S. at 26.

The burden, therefore, is on the defendants to show that the contractual impairment was "necessary to achieve an important public purpose." State of Nevada Employees Assoc., Inc. v. Keating, 903 F.2d 1223, 1228 (9th Cir. 1990). The apparent purpose of the statute, as discussed above, is to afford basic due process safeguards to the careers, livelihoods, and reputations of all Nevadans which include students, alumni, and employees of UNR and UNLV, and the fans and boosters of Nevada intercollegiate sports. While the statute does represent a legitimate exercise of police power, its singular narrow purpose does not elevate it to the level of state laws necessary to protect the health and safety of the people.

Moreover, impairment of contractual relations as a result of state action is more likely to be upheld when the law imposes a "generally applicable rule of conduct designed to advance a broad societal interest." Exxon Corp. v. Eagerton, 62 U.S. 176, 191 (1983). The law is less likely to survive constitutional scrutiny when it is designed to directly "adjust the rights and responsibilities of contracting parties." United States Trust Co., 431 U.S. at 22.

In this case, the Nevada law does not attempt to alleviate a broad societal problem; it specifically targets the NCAA and directs the NCAA to treat Nevada member institutions differently than it treats the other member institutions in contravention of preexisting contractual

agreements. The Nevada law's purpose is to adjust the rights and responsibilities of contracting parties. Further, the State of Nevada is attempting to enter a field it had never before sought to regulate; it attempts to bring about a permanent and significant alteration of the contract relationship of those entities within its coverage. See Allied Structural Steel Co., 438 U.S. at 250.

Finally, the State has failed to demonstrate that the statute was necessary to achieve a valid state interest. Indeed, the Nevada NCAA member institutions, along with the other member institutions, are free to modify existing contract rights and obligations with the NCAA by amending the NCAA bylaws and constitution. Further, the member institutions or the states are not precluded from asking the Congress to enact legislation to provide additional due process rights as may be deemed appropriate. The Nevada law simply does not possess the attributes of those state laws that have survived challenge under the Contract Clause. See Allied Structural Steel Co., 438 U.S. at 244.

Accordingly, the court concludes that the Nevada legislation unconstitutionally impairs the contractual relationship which exists between the NCAA and its Nevada member institutions in violation of Article I, Section 10 of the United States Constitution.

Consideration of the remaining claims raised by the NCAA would not alter the relief granted under Plaintiff's first and fourth causes of action and shall, therefore, not be considered by the court.

In addition, the court has stayed consideration of the counterclaims of Defendant Jerry Tarkanian, in which Lois

Tarkanian is also a named party, pending a resolution of the claims disposed of by this decision. Accordingly, that stay is VACATED.

CONCLUSION

Therefore, the court finds and concludes that the provision of Nev. Rev. Stat. §§ 398.155 - 398.255 violate Article I, Section 8, Clause 3 and Article I, Section 10 of the United States Constitution and are invalid and unenforceable against the NCAA. The defendants, Ronald Ganulin, Tim Grgurich, Jerry Tarkanian, Shelley Fischer, and the members of the Board of Regents of the University of Nevada are restrained and enjoined from taking any action to enforce or seek protection under the provisions of Nev. Rev. Stat. §§ 398.155 - 398.255.

The foregoing shall constitute findings of fact and conclusions of law.

Judgment shall be entered accordingly. The court directs the entry of final judgment as to those claims resolved by this decision and expressly determines there is no just reason for delay in entry of judgment.

It is so ORDERED.

Dated this 5th day of June 1992.

HOWARD D. McKIBBEN
UNITED STATES DISTRICT JUDGE

APPENDIX C

CHAPTER 398

INTERCOLLEGIATE ATHLETICS

GENERAL PROVISIONS

398.005. Definitions.

As used in this chapter, unless the context otherwise requires, the words and terms defined in NRS 398.015 to 398.075, inclusive, have the meanings ascribed to them in those sections. (1989, ch. 382, § 2, p. 811; 1991, ch. 55, § 15, p. 112.)

398.015. "Contractual relationship" defined.

"Contractual relationship" means an agreement between a sports agent and student athlete under which the sports agent agrees to:

1. Obtain or attempt to obtain employment for the student athlete with a professional sports team or as a professional athlete;

2. Provide loans, advances of money, services or other material goods to further the student athlete's pursuit of a career in professional sports; or

3. Represent the student athlete in any matter related to the student athlete's pursuit of a career in professional sports. (1989, ch. 382, § 3, p. 811.)

398.025. "Eligibility" defined.

"Eligibility" means the period of time during which a student athlete is enrolled as a student at an institution and is permitted to compete in intercollegiate athletic events by the institution and the national collegiate athletic association to which the institution is a member. (1989, ch. 382, § 4, p. 811.)

398.035. "Head coach" defined.

"Head coach" means the head coach of each intercollegiate athletic event in which the student athlete competes. (1989, ch. 382, § 5, p. 811.)

398.045. "Institution" defined.

"Institution" means a public or private institution that offers educational services beyond the secondary level. The terms includes:

1. A postsecondary educational institution as defined in NRS 394.099.

2. A university as defined in NRS 396.838. (1989, ch. 382, § 6, p. 811.)

398.055. "National collegiate athletic association" defined.

"National collegiate athletic association" means a group of institutions in 40 or more states who are governed by the rules of the association relating to athletic competition. (1989, ch. 382, § 7, p. 811.)

398.061. "Proceeding" defined.

"Proceeding" means a proceeding by a national collegiate athletic association or an institution involving an institution

located in this state or persons associated with an institution located in this state that may result in the imposition of a sanction for a violation of a rule of a national collegiate athletic association, including any related investigative action. (1991, ch. 55, § 3, p. 110).

398.065. "Sports agent" defined.

"Sports agent" means a person who solicits, personally or through an agent or employee, a student athlete to enter into a contractual relationship. The term does not include an attorney acting as legal counsel for the student athlete. (1989, ch. 382, § 8, p. 811).

398.075. "Student athlete" defined.

"Student athlete" means a student who is eligible and competes individually or as a member of a team in intercollegiate athletic events subject to the rules of the national collegiate athletic association to which the institution the student athlete is attending is a member. (1989, ch. 382, § 9, p. 812).

398.085. Liability for causing student athlete or institution to violate rule of national collegiate athletic association.

1. A person who causes a student athlete or an institution to violate a rule of the national collegiate athletic association to which the institution is a member, or aids in any such violation, is liable to the institution for damages as provided in subsection 2 if:

(a) The person knew or reasonably should have known that a rule was violated or would be violated; or

(b) The violation of the rule is a contributing cause of:

(1) Disciplinary action, including loss of eligibility, taken by the institution against a student athlete; or

(2) Disciplinary action taken by the national collegiate athletic association against the institution or a student athlete.

2. Damages that may be awarded against a person who causes a violation of a rule of a national collegiate athletic association, or aids in any such violation, include lost revenues to the institution from:

(a) Lost contracts for televising athletic events;

(b) A decline in ticket sales;

(c) Being prohibited from participating in post-season athletic events and tournaments; and

(d) Other discernible opportunities through which the institution would have realized revenue if the rule had not been violated.

3. It is a defense to a cause of action under the provisions of this section that, at the time the rule of the national collegiate athletic association was violated, the defendant was an employee of the:

(a) National collegiate athletic association whose rule was violated; or

(b) Institution maintaining the action,

and was acting within the scope of his employment.

4. If an institution prevails in an action brought pursuant to this section, it is entitled to an award of reasonable attorney's fees and costs. (1989, ch. 382, § 10, p. 812).

398.095. Contractual relationship between student athlete and sports agent: General requirements; notice to institution; rescission.

1. A contractual relationship between a student athlete and a sports agent must:

(a) Be in writing;

(b) Be signed by the student athlete and the sports agent;

(c) Be notarized by a notary public; and

(d) Contain a notice in substantially the following form:

WARNING: A student athlete who signs this agreement may lose eligibility to compete in intercollegiate athletics.

Nevada law requires that notice of this agreement be sent by registered or certified mail to the president and athletic director of the institution the student athlete is attending and the head coach of each intercollegiate athletic event in which the student athlete competes for it to be valid and enforceable.

Under Nevada law, a student athlete may rescind this agreement within 20 days after the date he signs the

agreement or the date on which the president, athletic director and head coach of the institution the student athlete is attending receives notice of the agreement.

A student athlete who signs this agreement before the last intercollegiate competition for which he is eligible and competes after signing the agreement may cause his team to forfeit all games in which he competes after signing the agreement and may render his team ineligible for postseason competition.

2. A notarized copy of the writing required by subsection 1 must be provided to the student athlete at the time he signs it.

3. A sports agent who enters into a contractual relationship with a student athlete during the student athlete's period of eligibility shall, not later than 3 days after entering into the contractual relationship, send notice of the contractual relationship by registered or certified mail to the representatives of the institution the student athlete is attending.

4. A student athlete may rescind a contractual relationship he has entered into with a sports agent by providing the sports agent with written notice of his rescission not later than 20 days after:

(a) Signing the agreement; or

(b) Notice of the contractual relationship is received by the president, athletic director and head coach of the institution the student athlete is attending.

5. A student athlete may not waive his right to rescind a contractual relationship pursuant to subsection 4.

6. Any consideration received by a student athlete pursuant to a contractual relationship with a sports agent or to induce the student athlete to enter into a contractual relationship with a sports agent shall be deemed a gift to the student athlete if the student athlete rescinds the agreement pursuant to subsection 4 or if the agreement is void and unenforceable.

7. Any contractual relationship between a student athlete and a sports agent which does not comply with the provisions of this section is void and unenforceable. (1989, ch. 382, § 11, p. 812).

IMPOSITION OF SANCTIONS BY NATIONAL COLLEGIATE ATHLETIC ASSOCIATION

398.155. Proceedings: General requirements.

1. In any proceeding, all parties against whom a sanction may be imposed must be afforded an opportunity for a hearing after reasonable notice. The notice must include:

(a) A statement of the time, place and nature of the proceeding;

(b) A reference to the particular rules governing the proceeding; and

(c) A short and plain statement of the violations alleged and the facts underlying the allegations.

2. A party to a proceeding may be represented by counsel, is entitled to confront and respond to all witnesses

and evidence related to the allegations against him and may call witnesses on his own behalf.

3. At least 30 days before any proceeding, all parties to a proceeding shall provide to all other parties all affidavits or other evidence to be introduced at the proceeding.

4. All written statements introduced as evidence at a proceeding must be notarized and signed under oath by the person making the statement.

5. Informal disposition may be made of any proceeding by stipulation, settlement or default. If an informal disposition is made, the parties to the proceeding may waive the requirements of findings of fact and a decision. (1991, ch. 55, § 4, p. 111.)

398.165. Proceedings: Record.

A record must be kept of all proceedings. The record must include:

1. All pleadings, motions and rulings;

2. All evidence received or considered;

3. All matters officially noticed;

4. Questions, offers of proof, objections and rulings thereon;

5. Findings of fact and exceptions thereto; and

6. The decision rendered in the proceeding. (1991, ch. 55, § 5, p. 111.)

398.175. Proceedings: Transcription of oral statements.

At the request of any party to a proceeding, oral statements made at the proceeding must be transcribed. (1991, ch. 55, § 6, p. 111.)

398.185. Proceedings: Evidence.

1. Irrelevant, immaterial or unduly repetitious evidence must be excluded from a proceeding. Evidence may be admitted if it is the type commonly relied upon by reasonable, prudent men in the conduct of their affairs.

2. The laws of this state relating to privilege must be observed in all proceedings.

3. Objections to evidentiary matters may be made and noted in the record of a proceeding.

4. Evidence may be received in written form if it will result in an expedited proceeding and will not substantially prejudice a party. (1991, ch. 55, § 7, p. 111.)

398.195. Proceedings: Person presiding.

A person presiding over a proceeding must be impartial and shall not communicate with a party to the proceeding concerning any issue of fact or law except upon notice and opportunity to participate by all parties. (1991, ch. 55, § 8, p. 111).

398.205. Proceedings: Decision and findings.

A decision must be rendered a reasonable time after the conclusion of a proceeding. The decision and the findings of fact must be based on substantial evidence in the record, and must be supported by a preponderance of such evidence. (1991, ch. 55, § 9, p. 111.)

398.215. Proceedings: Judicial review.

Parties aggrieved by the decision in a proceeding are entitled to judicial review in district court in the same manner that decisions of state agencies are reviewed pursuant to chapter 233B of NRS. (1991, ch. 55, § 14, p. 112.)

398.225. National collegiate athletic associations: Compliance with procedural standards; basis of findings; nature of penalties and sanctions.

1. A national collegiate athletic association shall not impose a sanction on any institution located in this state, its employees, student athletes, students or boosters, for a violation of the rules of the association, or impose a sanction on an institution located in this state or its athletic conference for failure of the institution to impose sanctions on its employees, student athletes, students or boosters, unless the association complies with the minimum procedural standards set forth in NRS 398.155 to 398.255, inclusive.

2. Any finding of a violation by a national collegiate athletic association must be based upon and supported by a preponderance of evidence which is of the type commonly relied upon by reasonable and prudent men in the conduct of their affairs and which has been submitted and received in a hearing held and conducted in conformance with the provisions of NRS 398.155 to 398.255, inclusive.

3. Any penalty or sanction imposed by a national collegiate athletic association must be reasonable in light of the nature and gravity of the violation and must be consistent with penalties and sanctions previously imposed by the national collegiate athletic association upon other member institutions for violations of similar nature and gravity. (1991, ch. 55, § 10, p. 111.)

398.235. National collegiate athletic association: Prohibited activities.

A national collegiate athletic association shall not:

1. Prevent an institution located in this state, its athletic conference or its student athletes, from athletic competition, free from sanctions, against other institutions, unless the minimum procedural standards required by NRS 398.155 to 398.255, inclusive, are observed.

2. Threaten with sanctions an institution that seeks redress under the provisions of NRS 398.155 to 398.255, inclusive.

3. Impair the rights or privileges of membership of any institution as a consequence of any rights granted under the provisions of NRS 398.155 to 398.255, inclusive. (1991, ch. 55, § 11, p. 112.)

398.245. Enforcement of provisions: Injunctions and other relief.

1. A district court may enjoin a national collegiate athletic association or institution from violating the provisions of NRS 398.155 to 398.255, inclusive. In addition to any other relief granted, a party who brings an action for injunctive relief must be awarded costs and reasonable attorney's fees if successful in the action.

2. In addition to costs and reasonable attorney's fees, a national collegiate athletic association is liable to the aggrieved institution for an amount equal to 100 percent of the monetary loss per year or portion of a year which is suffered during the period that any monetary loss occurs as a result of a penalty imposed in violation of the provisions of NRS 398.155 to 398.255, inclusive. To calculate monetary loss for the purposes of this subsection, "100 percent of the monetary loss per year" shall be deemed to

be equal to the gross amount realized by the affected athletic program during the immediately preceding calendar year. (1991, ch. 55, § 12, p. 112.)

398.255. Remedies cumulative.

The remedies provided to NRS 398.155 to 398.255, inclusive, are cumulative and in addition to any other remedies provided by law. (1991, ch. 55, § 13, p. 112.)

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No. 93-1369

In The

Supreme Court of the United States

October Term, 1993

JERRY TARKANIAN, TIM GRGURICH, RONALD GANULIN AND SHELLEY FISCHER,

Petitioners,

vs.

NATIONAL COLLEGIATE ATHLETIC ASSOCIATION,

Respondent.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. WHETHER THE NINTH CIRCUIT PROPERLY DETERMINED THAT THE NEVADA STATUTE VIOLATED THE COMMERCE CLAUSE OF THE UNITED STATES CONSTITUTION?

2. WHETHER THE NINTH CIRCUIT DECISION VIOLATES THE TENTH AMENDMENT AS AN IMPERMISSIBLE EXERCISE OF FEDERAL POWER?

LIST OF PARTIES

Petitioner Jerry Tarkanian

Petitioner Tim Grgurich

Petitioner Ronald Ganulin

Petitioner Shelley Fischer

Respondent National Collegiate Athletic Association

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BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

This case involves a request by the National Collegiate Athletic Association for a declaratory judgment and injunctive relief following petitioners' demands upon the NCAA to abandon its procedures for conducting investigations and hearings of potential NCAA rules violations, and to adopt, instead, the provisions of Nevada Revised Statutes §§ 398.155-398.255 (the "Statute"). The Statute directly regulates interstate commerce beyond Nevada's borders and has the extraterritorial effect of subjecting the NCAA to inconsistent legislation in other states, thereby destroying the national uniformity on which the NCAA's "product" is marketed. The Statute is therefore violative of the Commerce Clause of the United States Constitution, and petitioners' arguments to the contrary defy this Court's well-established precedent. Accordingly, the National Collegiate Athletic Association respectfully requests that this Petition for Writ of Certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit be denied.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the impact on the Commerce Clause of the United States Constitution, Art. I, § 8, cl. 3, of §§ 398.155 through 398.255 of the Nevada Revised Statutes. The Commerce Clause provides:

> Congress shall have power . . . [t]o regulate commerce . . . among the several states.

STATEMENT OF THE CASE

A. The NCAA.

As found by the Ninth Circuit Court of Appeals, the National Collegiate Athletic Association ("NCAA") is a voluntary, unincorporated association of 1,056 members, including four-year colleges and universities, conferences, associations and other educational institutions. Its members are located in every state of the United States. The NCAA itself conducts seventy-six (76) annual NCAA championship events throughout the United States that involve member teams and individual student-athletes from across the country, all competing under common rules of eligibility and amateurism. Likewise, collegiate recruiting of prospective team members takes place on a national (and even international) scale.

Among the purposes of the NCAA are to initiate, stimulate and improve intercollegiate athletic programs of student-athletes; to encourage its members to adopt eligibility rules to comply with satisfactory standards of scholarship, sportsmanship and amateurism; to formulate and publish rules of play governing intercollegiate athletes; to establish eligibility standards for regional and national athletic events; and to legislate, through bylaws or by resolutions of a convention, upon any subject of general concern to the members related to the administration of intercollegiate athletics. As set forth in the NCAA Constitution, it is a fundamental policy of the Association "to maintain intercollegiate athletics as an integral part of the educational program and the athlete as an integral part of the student body and, by so doing, retain a clear line of demarcation between intercollegiate athletics and

professional sports." (NCAA Const. § 1.3.1). Another fundamental policy is that "member institutions shall be obligated to apply and enforce [NCAA] legislation, and the enforcement program of the Association shall be applied to an institution when it fails to fulfill this obligation." (NCAA Const. § 1.3.2).

UNLV, the institution employing the petitioners, is and has been a member of the NCAA since 1958. Upon requesting to join the Association, it agreed, in writing, to administer its athletic programs in accord with the constitution, bylaws and other legislation adopted by the members of the Association. As the Nevada Legislature stated in its findings, "member institutions must agree contractually to administer their athletic programs in accordance with the rules of the National Collegiate Athletic Association."

The enforcement program, referenced in the above-fundamental policy, is included in the NCAA bylaws. These bylaws, and all legislation of the NCAA, must be adopted by a vote of the active members during the Annual Convention. Just as each member must agree to abide by the substantive rules of the Association relating to eligibility, recruiting, financial aid, admissions and other matters, the members must also agree to submit to the enforcement program, including the procedures.[1] As indicated by Professor Charles Alan Wright of the University of Texas (a former member and chairman of the NCAA Committee on Infractions) in his affidavit to the

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[1] As this Court has stated, "By joining the NCAA, each member agrees to abide by and to enforce [the legislation]." *NCAA v. Tarkanian*, 488 U.S. 179, 183 (1988).

trial court, it would be impossible for the NCAA to enforce substantive rules without nationally uniform procedures.

The NCAA enforcement program is administered by the NCAA Committee on Infractions, composed of six members from the staffs of member institutions or conferences and appointed by the NCAA Council. The Committee establishes the procedure for investigating possible infractions of the rules that govern recruiting, admission, eligibility and financial aid of student-athletes. The member institutions vote to approve these procedures. The Committee considers complaints concerning member institutions, determines facts related to alleged violations, considers whether an institution has taken appropriate corrective actions for admitted violations and imposes corrective action on members found to be in violation of NCAA rules.[2] The corrective actions that the Committee may assess have been adopted by the membership and are contained in the NCAA bylaws.

The 1991-92 NCAA Manual, as well as the opinions of both the District Court and Ninth Circuit outlining the uncontroverted facts, set forth procedures that must be followed in the processing of an infractions case with respect to any member institution located anywhere in the United States.[3] The procedures, sanctioned by the

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[2] The NCAA does not take action against institutional employees or student-athletes, but only against the member institutions. The members are required, however, to apply the agreed-upon rules applicable to employees and student-athletes.

[3] Petitioners characterize NCAA procedures as "procedural due process atrocities." (Petition, p. 3). As recognized

membership, include the initial notification to the institution that a preliminary inquiry is being made. If the enforcement staff determines that a possible rule violation has occurred, it sends an Official Inquiry to the Chief Executive Officer of the institution. The Official Inquiry must include a statement of the NCAA rule alleged to have been violated and the details of each separate allegation. The staff must also provide the institution and other involved individuals with the names of the principals involved and the names, addresses and telephone numbers of any persons contacted during the NCAA investigation. The institution is required to advise all involved individuals, all present or former staff members and any prospective, present or former student-athlete whose eligibility could be affected by the charges, that they have the opportunity to submit any information they desire to the Committee and that they and their personal legal counsel may appear before the Committee. The institution is also required to investigate the charges, interview the principals and other individuals contacted by the staff, indicate whether the allegations are substantially correct and submit written evidence to the Committee to support its responses to the Official Inquiry.[4]

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by the courts below, however, the NCAA procedures outline detailed steps that the membership (including UNLV) has provided.

[4] These cooperative, nonadversarial procedures are a balance between institutional responsibility and independent verification through the NCAA enforcement staff to achieve a program that is effective, fair and compatible with the autonomy of the members.

Prior to the Committee on Infractions hearing, prehearing conferences are held with the NCAA staff, the institution and all affected individuals and their legal counsel. At those meetings, the NCAA staff is required to provide all information upon which it intends to rely at the hearing. All involved parties review all relevant documents and statements. Violations may be agreed upon or withdrawn and areas of factual dispute are identified. Agreements are reached concerning further possible joint interviews to assist in resolving conflicts in information. Before the Committee calls a hearing to resolve controverted matters, the NCAA staff must deliver to all concerned parties a summary statement of the case that identifies the individuals and information upon which the staff will rely in presenting the case.

The Committee on Infractions hearing consists of a detailed presentation of the case by the enforcement staff, followed by the responses from the institution and any affected individuals (and their legal representatives). Questions and information may be exchanged among all parties at the hearing. After the hearing, the Committee members privately make their determinations of fact, determine appropriate corrective action, if any, and prepare their written report. The NCAA bylaws require that the Committee must base its findings on information provided to it that it determines to be credible, persuasive and of a kind on which reasonably prudent persons rely in the conduct of serious affairs. The institution and individuals may appeal the Committee's findings of fact and recommended corrective action to the NCAA Council. Additional evidence and arguments may be submitted in the appeal hearing.

The Committee on Infractions hearings are not criminal hearings.[5] The primary issue before the Committee is whether a member institution has violated the rules enacted by the membership. There is no process whereby the NCAA can force individuals to give depositions or to appear before the Committee for purposes of cross-examination, as the Committee has no power to issue subpoenas.[6]

B. The Nevada Statute.

Prior to the Nevada Statute becoming law, the NCAA and UNLV staffs had been conducting their separate investigations concerning alleged violations of NCAA rules with respect to the UNLV basketball program.[7]

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[5] Petitioners refer to NCAA investigations and hearings as "prosecutions" at which they are the "accused." This terminology is inaccurate and misleading in the context of enforcement proceedings of a private, voluntary association.

[6] Even if a particular jurisdiction gave the private Association authority to subpoena within its boundaries, principals and witnesses in an infractions case are generally located throughout the United States.

[7] Petitioners contend that the Statute was enacted in response to the most recent NCAA investigation and the "show cause" order which occurred subsequent to this Court's decision in *Tarkanian v. National Collegiate Athletic Association, supra.* In the courts below, Petitioners cited no evidence which supported this assertion. In addition, the petitioners mischaracterize the penalty imposed in 1990 when they state that UNLV was placed on "an additional year of probation."

In fact, Bylaw 19.4.2.1(m) provides that if an institution is unable to take the Committee's recommended action, it simply reports that fact to the Committee or shows the Committee what corrective action it has taken. The Committee accepts the institution's action or conducts a further hearing. This is the process

Statements had been obtained; information had been gathered; responses had been made to the Official Inquiry by the individuals and UNLV; and the prehearing conferences and Committee on Infractions hearing dates were scheduled. However, shortly before the prehearing conferences were to be held, petitioners made written demands upon the NCAA to substantially abandon its procedure for conducting the investigation and holding the Committee's hearing and to adopt the various provisions of Nev. Rev. Stat. §§ 398.155-398.255. Among the changes demanded were: a requirement that NCAA turn over documents to petitioners prior to the prehearing conference; each petitioner be allowed to confront all witnesses; an independent entity be selected to adjudicate the facts and assess corrective actions; all proceedings be recorded and transcribed; and all other provisions of the Nevada Statute be followed. In response to these demands, the NCAA was compelled to suspend the conferences, postpone the scheduled hearing, and halt further processing of the UNLV infractions case. The NCAA and UNLV could not comply with the petitioners' demands without violating the NCAA rules applicable to all members throughout the United States.

The Nevada Statute mandates numerous procedures for the enforcement proceedings that differ from those contained in NCAA rules and bylaws. For example,

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followed in 1990 when Tarkanian's litigation against the NCAA was finally terminated by the Nevada courts. UNLV reported it could not comply with the 1977 show cause provision pertaining to Tarkanian's suspension, and, after hearings, the parties arrived at an institutional penalty (to which petitioner Tarkanian agreed) in lieu of the original one.

although required by the Statute, the NCAA does not permit a party to a proceeding to confront all witnesses, to have all written statements signed under oath and notarized, or to have a court review each Committee decision. Further, the Statute requires an "impartial" hearing officer. Only the membership in convention can authorize someone other than the Committee on Infractions to conduct the hearing. To permit an outside person to conduct the hearing would destroy one very integral and effective part of the NCAA enforcement process, a hearing by a committee of one's peers.[8]

The NCAA cannot provide its Nevada members with procedural protection it denies others. Due to its inability to subpoena witnesses or require their cooperation, an infractions proceeding could not practicably be processed in compliance with the Nevada statutory provisions even if the NCAA changed its enforcement procedures to the benefit of Nevada members. As a practical matter, the Nevada Statute would force the NCAA to provide all of its members with the same procedural protection that

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[8] The Statute also provides that a state district court may enjoin the NCAA proceeding that violates the statutory provisions. An aggrieved institution raising a successful challenge under the Statute is entitled to costs, attorney fees and compensatory damages equal to "100 percent of the monetary loss per year or portion of a year which is suffered . . . as a result of a penalty imposed in violation of the [Statute]." Nev. Rev. Stat. § 398.245. The Statute further prohibits an association from impairing the rights and privileges of membership of any institution as a consequence of any rights granted by §§ 398.155 - 398.255. Nev. Rev. Stat. § 398.235(3). Thus, the NCAA cannot avoid complying with the Statute by simply expelling its Nevada members.

have been decreed for Nevada institutions, as there cannot be inconsistent enforcement provisions. Both consistent enforcement procedures and consistent substantive rules are necessary to maintain a level playing field for competition throughout the United States. The NCAA simply cannot maintain a nationwide system of interstate competitions and monitor compliance with agreed-upon regulations if some institutions are granted procedural rights that others are not, any more than it could allow some schools to pay their athletes or exempt them from attending classes.

It is for these reasons that the NCAA filed the instant declaratory judgment action seeking a declaration that the Statute was unconstitutional because it violated the Commerce Clause and the Contract Clause.[9]

C. Proceedings in the lower courts.

In October, 1987 the NCAA Enforcement Staff commenced an investigation of possible rules violations by the University of Nevada, Las Vegas intercollegiate basketball program. On December 27, 1990 the NCAA submitted an Official Inquiry to UNLV asking the institution to investigate and respond to certain information

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[9] The NCAA also alleged violations of the First and Fourteenth Amendments. The district court ruled that such causes of action would not be considered in view of its ruling that the Statute violated both the Commerce and Contract Clauses. See Petitioner's Appendix ("P. App.") at B-25. The Ninth Circuit stated it did not need to address the Contract Clause issue in view of its finding that the Statute violated the Commerce Clause. P. App. at A-9.

received by the NCAA. UNLV and the NCAA enforcement staff continued their separate investigations of the possible rule violations and, on July 19, 1991, the NCAA scheduled prehearing conferences with UNLV, the petitioners and other individuals who were implicated in the possible violations of the NCAA rules. The petitioners responded that they would not follow the NCAA investigation and hearing procedures and demanded that the NCAA follow the procedures mandated by the Statute, adopted April 8, 1991.

Because the Nevada Statute would have outlawed many of the procedures followed by the NCAA and UNLV in their respective investigations, and because the NCAA could not proceed under the investigation and hearing requirements of the Statute, the NCAA ceased its investigation, canceled the proposed hearings, and filed the instant action. The complaint named as defendants Governor Miller and the petitioners (the coaches and employees of UNLV who had demanded that the NCAA and UNLV abandon the NCAA procedures and process the investigation and hearing under procedures mandated by the Statute). The District Court dismissed Governor Miller and, instead, ordered UNLV to appear as a party to the suit.

The District Court held that the Statute violated the Commerce and the Contract Clauses. The court did not rule on the NCAA's remaining claims. On petitioners' appeal, the United States Court of Appeals for the Ninth Circuit affirmed the judgment of the District Court as to the Commerce Clause, but did not reach the issue of the Contract Clause.

Because the NCAA markets interstate intercollegiate athletic competition, the Ninth Circuit found that the NCAA is engaged in interstate commerce. The Court of Appeals held that the Statute, by its own terms, regulates only interstate organizations. The Statute directly regulates interstate commerce because the practical effect of the Statute is to require the NCAA to adopt the Statute's procedural rules of enforcement proceedings throughout the country. Because of this effect, and because other states have, or may adopt, statutes with inconsistent procedural requirements, the Court of Appeals found that the Statute directly regulates interstate commerce and violates the Commerce Clause *per se*.

D. Petitioners' reliance upon "findings" of state court judges is improper, as they are not part of valid and final judgments.

The petitioners claim that the "findings" of two Nevada courts purportedly illustrate that the Statute is a necessary tool to force the NCAA to fairly administer its rules. Aside from the fact that there is no record in this case that the Nevada Legislature considered the decisions cited when enacting its legislation,[10] the "findings" on which petitioners rely lack any probative or precedential value in this action because they are not part of valid and final judgments.

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[10] Petitioner Tarkanian did file copies of the opinions with the District Court. However, he made no showing that the Nevada Legislature considered such in enacting the Nevada Statute at issue.

For example, petitioners quote at length from the Nevada trial court's decision in a case pursued by Tarkanian in 1977.[11] As petitioners are aware, however, the NCAA was not even a party to the first (1977) state court action. Moreover, in *University of Nevada v. Tarkanian*, 95 Nev. 389, 594 P.2d 1159 (1979), the Supreme Court of Nevada reversed the trial court's judgment in favor of Tarkanian and remanded the case.

The petitioners also rely heavily upon the decision of the state court judge who heard the case following remand ("the second suit").[12] In the second suit, the

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[11] In 1977 Jerry Tarkanian sued the University of Nevada for deprivation of the protection of the First and Fourteenth Amendments. After Tarkanian and the University entered into a friendly stipulation of facts, the Nevada trial court entered a permanent injunction only seventeen days after suit was filed. Although the NCAA Infractions Committee had sanctioned UNLV and suggested that corrective action be taken by UNLV as to various coaches, and boosters, Tarkanian brought suit in 1977 to enjoin only the sanction suggested by the NCAA to UNLV that he be disassociated from the UNLV basketball program for two years. In *University of Nevada v. Tarkanian*, 95 Nev. 389, 594 P.2d 1159 (1979), the Supreme Court of Nevada reversed the judgment in favor of Tarkanian and remanded the case to give him an opportunity to join the NCAA as a defendant.

[12] In the second suit, the trial court enjoined both the University of Nevada and the NCAA from causing the temporary suspension of Tarkanian's head coaching duties and awarded Tarkanian his attorney's fees. Only the NCAA appealed and the Supreme Court of Nevada affirmed the judgment against the NCAA. *Tarkanian v. National Collegiate Athletic Association*, 103 Nev. 331, 741 P.2d 1345 (1987). That judgment was reversed by this Court in 1988. *Tarkanian v. National Collegiate Athletic Association*, 488 U.S. 179 (1988).

NCAA appealed the trial court's judgment and the Nevada Supreme Court affirmed. *Tarkanian v. NCAA*, 103 Nev. 331, 741 P.2d 1345 (1987). However, that judgment was ultimately reversed outright by this Court's decision in *Tarkanian v. NCAA*, 488 U.S. 179 (1988).

The findings made in prior litigation are not conclusive evidence in subsequent litigation unless they establish the ultimate facts in issue in the subsequent litigation. That state court judges in 1977 and in 1984 were of the opinion that NCAA staff did not treat Jerry Tarkanian fairly does not establish an ultimate fact in this action. If petitioners are citing these earlier findings as evidence of the alleged need for the Nevada Statute, a better source of the Legislature's motive would be found in those materials actually considered by the Legislature, none of which were presented by petitioners to the courts below.

REASONS FOR DENYING THE WRIT

The Ninth Circuit was correct in holding that the Nevada Statute violates the Commerce Clause of the United States Constitution. Consistent with the decision below, it is clear that the Nevada Statute is a direct regulation of the NCAA's governance of intercollegiate athletics because it destroys the national uniformity of the NCAA's enforcement procedures and, in practical effect, would require the NCAA to adopt the stringent Nevada provisions, or the strictest provisions of similar state statutes, nationwide. The Statute directly regulates the flow of interstate commerce and exceeds the limits of

Nevada legislative authority because it reaches beyond the state's borders and interferes with the marketing of the "product" of amateur athletics across the country. As such, the Nevada Statute cannot stand, regardless of any purported purpose the Statute may have been enacted to achieve, because the Commerce Clause prohibits Nevada from significantly interfering with the NCAA governance of intercollegiate athletics throughout the United States.

The Ninth Circuit properly recognized that the NCAA's ability to accomplish its goals of scholarship, sportsmanship and amateurism uniquely depends on the creation of nationally uniform rules under which 1,056 member teams and conferences can compete on an equal basis. The procedures by which the substantive rules are enforced must also be uniform nationwide to assure evenhanded application of the rules and consistent treatment among members. However, as the Ninth Circuit also correctly noted, the Nevada Statute mandates numerous procedures for an enforcement proceeding (*e.g.* confrontation of witnesses, despite the lack of NCAA subpoena power; the requirement of an outside hearing officer other than one sanctioned by the membership; the disclosure and release of information, despite the members' recognition of the importance of confidentiality; de novo review of a private association's determinations by a court; engrafting of rules of civil procedure relating to privilege, objection and evidentiary standards, etc.) that differ from those contained in the NCAA bylaws.

The inconsistency between the NCAA bylaws and the Nevada Statute is serious, for the NCAA cannot provide its Nevada members with procedural protections that it denies to others. Further, as a practical matter, the

NCAA could *not* comply with some aspects of the Statute, even if the NCAA enforcement procedures were changed in all other respects to comport with the legislative mandate. Nevertheless, if Nevada members alone were somehow allowed, for example, to confront adverse witnesses in enforcement proceedings, it obviously would be more difficult (if not impossible) to sanction them. Nevada institutions thus would have less incentive to comply with the NCAA rules that govern intercollegiate competition; they would know that the NCAA would be reluctant to use its finite resources to enforce rules in the burdensome Nevada venue.

The Nevada Statute would ultimately force the NCAA to provide all of its members with the same procedural protections that have been legislatively decreed for UNLV and UN-Reno, at least insofar as it can practically provide those protections. This result is inevitable since NCAA members would not likely agree to be bound by procedural rules providing greater protection to Nevada members, any more than they would agree to rules exempting Nevada institutions from the proscription on hiring athletes. Or, as in other situations found to be violative of the Commerce Clause, the Nevada Statute would "likely compel all member teams to comply with the laws of the strictest state." *See e.g., Partee v. San Diego Chargers Football Co.*, 34 Cal.3d 378, 385 (1983), *cert. denied*, 466 U.S. 904 (1984).[13]

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[13] In fact, the statute explicitly precludes the NCAA from taking the one step that might eliminate the need to adopt nationwide procedures mimicking those established by the Nevada Legislature. Section 398.235 provides that the NCAA

I. THE NINTH CIRCUIT CORRECTLY DETERMINED THAT THE NEVADA STATUTE IS A PER SE VIOLATION OF THE COMMERCE CLAUSE.

A. The decision of the Court of Appeals is legally correct and consistent with prior decisions of this Court. Substantial precedent from this Court supports the Court of Appeals' decision.

Petitioners assert that the Ninth Circuit erred when it determined that the Statute was a *per se* violation of the Commerce Clause, claiming that the Court was precedentially bound to find that the Statute either discriminated against interstate commerce or favored in-state economic interests over out-of-state interests. Petitioners argue that the Ninth Circuit's ruling was error because, instead, the Court determined that the Statute was constitutionally infirm, as it directly regulated "interstate commerce beyond Nevada's state borders" and had the extraterritorial effect of subjecting the NCAA "to inconsistent legislation arising from the injection of Nevada's regulatory scheme into the jurisdiction of other states." See, P. App. at A-13 and A-14. Direct regulation is not enough, petitioners argue, and for that reason request review by this Court.

Contrary to petitioners' assertions, the Ninth Circuit's decision is based upon, and consistent with, this Court's rulings which address the Commerce Clause. The

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shall not "[i]mpair the rights or privileges of membership of any institution as a consequence of any rights granted" under the Act. Thus, the members of the NCAA may not even expel its Nevada institutions and thereby avoid the procedural mechanisms mandated by the Statute.

Ninth Circuit analysis is premised upon *Healy v. Beer Institute, Inc.*, 491 U.S. 324 (1989), in which this Court reiterated the two-tiered approach for addressing state regulations under the Commerce Clause, to wit:

> When a state statute directly regulates *or* discriminates against interstate commerce, *or* when its effect is to favor in-state economic interests over out-of-state interests, we have generally struck down the statute without further inquiry. When, however, a statute has only indirect effects on interstate commerce and regulates evenhandedly, we have examined whether the State's interest is legitimate and whether the burden on interstate commerce clearly exceeds the local benefits.

Healy, supra, 491 U.S. at 337 n.14 (emphasis added) (quoting *Brown-Forman Distillers Corp. v. New York State Liquor Authority*, 476 U.S. 573 (1986) (citations omitted in original)). *See also*, P. App. at A-9, 10.

It is clear, under this Court's analysis, that a state statute need not directly discriminate against interstate commerce or favor in-state over out-of-state interests in order to be deemed a *per se* violation of the Commerce Clause. Rather, as found by the Ninth Circuit, a law violates the Commerce Clause if it directly regulates interstate commerce. *Shafer v. Farmer's Grain Co.*, 268 U.S. 189, 199 (1925).

In *Edgar v. Mite Corp.*, 457 U.S. 624, 640-42 (1982), this Court confirmed that the Commerce Clause prohibits direct regulation of interstate commerce. "Direct regulation" occurs when a statute directly interferes with or burdens transactions that "take place across state lines"

or wholly outside of the state's borders. *Id.*, 457 U.S. at 641. Extraterritorial regulation "exceeds the inherent limits of the enacting State's authority and is invalid regardless of whether the statute's extraterritorial reach was intended by the legislature." *Id; Baldwin v. G.A.F. Seelig*, 294 U.S. 511, 521 (1935). "The critical inquiry is whether the practical effect of the regulation is to control conduct beyond the boundaries of the state." *Healy, supra*, 491 U.S. at 336.

As the Ninth Circuit properly found, the Nevada Statute extends the reach of Nevada law far beyond the borders of that state, and improperly precludes the NCAA from establishing uniform rules to govern and enforce the interstate collegiate practices associated with admissions, financial aid, eligibility, recruiting and other basic athletics issues. The Statute has the "practical effect" of controlling enforcement proceedings elsewhere simply because the NCAA cannot enforce more lenient standards for its Nevada members than for its other members.[14] The reality is that the NCAA's monitoring and compliance system cannot survive if it cannot be applied uniformly in all states.

In *Healy*, the United State Supreme Court also held that:

> . . . the practical effect of the statute must be evaluated not only by considering the consequences of the statute itself, but also in considering how the challenged statute may interact

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[14] In fact, the Nevada Statute has thwarted the processing of an infractions case in New Mexico because one of the parties was a Nevada resident.

> with the legitimate regulatory schemes of other states and what effect would arise if not one, but many or every, state adopted similar legislation.

Healy, supra, 491 U.S. at 336. The Ninth Circuit was correct in finding that a strong possibility exists that other states will adopt, and have adopted, legislation flatly inconsistent with the Nevada Statute, thereby preventing the NCAA from having the uniform rules and procedures essential to its existence. It defies common sense to suggest, as the legislatures in Nevada and several other states have done or threaten to do, that a private association can enforce its substantive rules if each state can dictate the procedures used to enforce those rules, each designed to protect its coaches, athletes and institutions. Because the NCAA must have uniform procedures, the inevitable result will be to require the NCAA to apply the strictest provisions of all of the statutes in all states. On that basis, the Ninth Circuit correctly determined that the Statute is an impermissible regulation of commerce.

The Nevada Statute directly regulates the NCAA rules that govern competition in intercollegiate athletics. The impermissible interference with interstate commerce results simply from the fact that the Statute "directly controls commerce occurring wholly outside the boundaries" of the state (*Healy*, 491 U.S. 324, 326 (1989)), and will adversely affect the NCAA's ability to conduct its business according to agreed-upon rules applicable *uniformly* to all of its member institutions. That is, by adopting the Nevada legislation to force the NCAA to comply with procedural mandates, the Nevada Legislature has extended Nevada law beyond the borders of the state in a manner that directly regulates the activities in all fifty

states. It has disrupted the uniformity of rules and regulations required to preserve the competitive conditions upon which the integrity and success of the NCAA's program depends. The only solution that would allow a level "playing field" is for the NCAA to attempt to adopt the strictest provisions of all state legislation and attempt to apply those requirements throughout the country. But requiring the NCAA to conform its national practices with the laws of every state is just what the Commerce Clause prohibits. Therefore, the Ninth Circuit correctly determined that the Statute was constitutionally infirm as a direct regulation of interstate commerce.

B. The Ninth Circuit properly analyzed the Statute and determined that it was a *per se* violation of the Commerce Clause.

Petitioners next argue that the Ninth Circuit erred in its Commerce Clause analysis because the State's interests in enacting the legislation "must always be considered." Had those interests been weighed, petitioners opine, the court "might have concluded that . . . the state was properly exercising its police power when it enacted the . . . Statute." Petition, p. 18. Both conclusions drawn by the petitioners are, at best, misleading.

First, this Court has never held that Commerce Clause analysis "must always" include consideration of a state's interests in enacting the Statute. Pursuant to well-established principles, the Ninth Circuit properly deemed the Statute invalid *per se*, without further inquiry. *See Healy, supra,* 491 U.S. at 337 ("When a state statute directly regulates . . . interstate commerce . . . we have

generally struck down the statute without further inquiry . . . "). A *per se* violation was appropriately found by the Ninth Circuit, even in light of this Court's decision in *Chemical Waste Management, Inc. v. Hunt*, 112 S. Ct. 2009, 119 L.Ed.2d 121 (1992),[15] because the Statute directly regulates interstate commerce beyond Nevada's borders and its extra-territorial effect subjects the NCAA to the potential of inconsistent regulation from state to state.

Second, the argument regarding the Ninth Circuit's need to consider Nevada's interests in enacting the legislation is, in reality, nothing more than an academic exercise. That is, the Ninth Circuit specifically found that, even if balancing the state's interest was necessary or appropriate, the "balance struck by the learned trial judge was exactly right."[16] P. App. at A-14. The trial court concluded that:

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[15] *Chemical Waste* did not overrule the line of cases which establish, and reaffirm, *per se* analysis of state regulations under the Commerce Clause, including *Healy, supra*, and *Philadelphia v. New Jersey*, 437 U.S. 617 (1978). While this Court, in *Chemical Waste*, determined that the state must "justify" a facially discriminatory statute in terms of the local benefits flowing from it and the unavailability of nondiscriminatory alternatives, this Court also stated that, where a facially discriminatory statute was analyzed, strict scrutiny of any purported legitimate local purpose was the "minimum" standard to be applied. *Chemical Waste*, 119 L.Ed.2d at 132 (citations omitted). A *per se* violation, without inquiry into the purported local purpose, was therefore not eliminated by this Court's decision in *Chemical Waste*.

[16] The petitioners refer to the Ninth Circuit's decision regarding the balancing performed by the district court as "merely dictum." To the contrary, the Ninth Circuit found that the Nevada Statute violates the Commerce Clause *per se*, and that it need not balance the burden on interstate commerce

> Any narrow interests the State of Nevada may have in imposing the requirements [of the Statute] for the protection of institutions and individuals residing in Nevada is outweighed by the general harm to the uniform enforcement of regulations by the NCAA and its member institutions throughout the country.

P. App. at B-18. The Ninth Circuit's opinion affirmed these particular findings of the District Court. There is no chance, then, that the Ninth Circuit "might have concluded" that the Statute was valid as an appropriate exercise of police power, since the Court of Appeals had already adopted the trial court's finding to the contrary.

C. Petitioners' reliance on *Cloverleaf Creamery, Collins and Erie R.R.* are misplaced.

Petitioners argue that the Ninth Circuit erred when it failed to uphold the validity of the Statute, suggesting that the case at hand is "no different" from other cases in which interstate entities were deemed bound to comply with valid state regulations, despite asserted needs for uniform, internal methods of operation. *See, Minnesota v. Cloverleaf Creamery Co.*, 449 U.S. 456, *reh'g denied*, 450 U.S. 1027 (1981); *Collins v. American Buslines, Inc.*, 350 U.S. 528, *reh'g denied*, 351 U.S. 928 (1956); and *Erie R. R. v. Williams*,

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against the local benefit derived from the Statute. Rather than mere dictum, the Court of Appeals then clearly found that if balancing were necessary and appropriate, the trial court had properly analyzed the state's interests and found them lacking. P. App. at A-14.

233 U.S. 685 (1914). However, these cases are inapposite to the situation at hand for at least two reasons.

First, the cases relied upon by petitioners do not involve situations, as here, where the legislation impacts interstate commerce beyond the legislating state's boundaries. For example, despite a state regulation affecting product packaging, a milk distributor may package his product in cardboard milk cartons as required in state "A" and still sell milk in plastic jugs in state "B." *See, Cloverleaf Creamery, supra,* 449 U.S. at 472. By the same token, an employer can continue doing business as usual across the country, despite statutory requirements in one jurisdiction mandating more frequent payrolls than customarily paid by the employer in other areas of the nation. *Erie R.R., supra,* 233 U.S. at 705. Finally, an interstate employer may be financially burdened in a single state due to worker's compensation insurance requirements, but the requirements have no effect on the business conducted or the internal workings of the company in other states. *Collins, supra,* 350 U.S. at 351.

By contrast, the Ninth Circuit correctly found that "[t]he Statute would force the NCAA to regulate the integrity of its product in every state according to Nevada's procedural rules. . . . [T]he Statute could control the regulation of the integrity of a product in interstate commerce that occurs wholly outside Nevada's borders." P. App. at A-12. The Ninth Circuit properly determined that this sort of extraterritorial effect, not found in *Cloverleaf, Erie,* or *Collins,* is forbidden by the Commerce Clause. Moreover, the Ninth Circuit recognized the constitutional impropriety of the Statute's "potential interaction or conflict with similar statutes in other jurisdictions." P. App.

at A-12. Unlike the situations in the cases cited by petitioners, the Ninth Circuit was correct in determining that "[t]he serious risk of inconsistent obligations wrought by the extraterritorial effect of the Statute demonstrates why it constitutes a *per se* violation of the Commerce Clause." P. App. at A-13.

The cases on which petitioners rely are also distinguishable from the case at hand because none of the cited cases involve the attempted regulation of a product in interstate commerce which is, by its very nature, premised upon the concepts of uniformity and consistency. *See, e.g., Collins, supra,* 350 U.S. at 531 (citing *Southern Pacific Co. v. Arizona,* 325 U.S. 761 (1945), wherein this Court rejected the argument that statutorily mandated worker's compensation requirements devastated the uniform internal workings of an interstate busline company to the same degree as the regulation of train lengths disrupted the railroad industry). On the other hand, the Ninth Circuit in the instant case found that "the authority [Nevada] seeks here goes to the heart of the NCAA and threatens to tear that heart out. Consistency among members must exist if an organization of this type is to thrive, or even exist. Procedural changes at the border of every state would as surely disrupt the NCAA as changes in train length at each state's boarder would disrupt a railroad." P. App. at A-15 (citing *Southern Pacific Co., supra*).

In fact, this Court has long recognized that the situation at hand is distinguishable from the cases cited by the petitioners. For example, this Court cited *Collins v. American Buslines, Inc., supra,* in its decision of *Huron Portland Cement Co. v. City of Detroit,* 362 U.S. 440 (1960), for the proposition that, under certain circumstances, a statute

embodying an exercise of a state's police power may withstand constitutional scrutiny even though the legislation may indirectly affect interstate commerce. *Huron, supra,* 362 U.S. at 443-44. However, the *Huron* court then expressly held that "a state may not impose the burden which materially effects interstate commerce in an area where uniformity is necessary." *Id.* at 444 (citing *Hall v. DeCuir,* 95 U.S. 485 (1877); *Southern Pacific Co. v. Arizona,* 325 U.S. 761 (1945); *Bibb v. Navajo Freight Lines, Inc.,* 359 U.S. 520 (1959)).

II. THE NINTH CIRCUIT DECISION DOES NOT VIOLATE THE TENTH AMENDMENT

Petitioners claim that the Ninth Circuit decision is violative of the Tenth Amendment because the judicial determination is purportedly an unlawful "exercise of federal power under the Commerce Clause." Petition, p. 13. In this regard, petitioners assert that the Ninth Circuit opinion is inconsistent with the dictates of this Court, allegedly set forth in *National League of Cities v. Usery,* 426 U.S. 833 (1976), *EEOC v. Wyoming,* 460 U.S. 226 (1983) and *Hodel v. Virginia Surface Mining & Reclamation Ass'n, Inc.,* 452 U.S. 264 (1981). Petitioners' claim is utterly without merit.

First, the cases on which petitioners rely do not limit the power of a *federal court* to strike as unconstitutional a state statute under the Commerce Clause. Rather, these cases recognize limitations on *Congressional* power in regulating commerce, in light of state sovereignty and the

Tenth Amendment.[17] Petitioners do not assert that the Tenth Amendment was violated due to improper congressional action, but attempt to broaden the theory of *National League of Cities* to restrict the authority of the federal court system. The cases cited, however, do not so hold and have no bearing on the case at hand.

Even if the cases cited by petitioners were applicable herein, which respondent denies, *National League of Cities v. Usery, supra,* was overruled by this Court in *Garcia v. San Antonio Metropolitan Transit Auth.*, 469 U.S. 528, *reh'g denied,* 471 U.S. 1049 (1985). In *Garcia,* this Court recognized that its previously-established test, used to determine appropriate limitations on congressional action and set forth in *Hodel, supra,* was not only unsound in principle and unworkable in practice, but was also a disservice to principles of democratic self-governance. *Garcia, supra,* 469 U.S. at 546-547. This Court held, in *Garcia,* that the factors endorsed by petitioners and *National League of Cities* were obsolete and that, instead, "states must find their protection from *congressional* regulation through the national political process, not through judicially defined spheres of unregulable state activity." *South Carolina v.*

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[17] *See e.g., Hodel, supra,* 452 U.S. at 286-87, wherein this Court held:

> When *Congress* attempts to regulate the States as States the Tenth Amendment requires recognition that 'there are attributes of sovereignty attaching to every state government which may not be impaired by *Congress,* not because *Congress* may lack an affirmative grant of legislative authority to reach the matter, but because the Constitution prohibits it from exercising the authority in that manner.'

Id. (citations omitted) (emphasis added).

Baker, 485 U.S. 505, 512, *reh'g denied*, 486 U.S. 1062 (1988) (citing *Garcia*, *supra*, 469 U.S. at 537-54) (emphasis added).

In sum, petitioners attempt to apply the facts of this case to a standard condemned by this Court which (even when valid) was intended to determine the proper limitation of *congressional* power under the Commerce Clause. The standard advanced by the petitioners is inapplicable to decisions rendered by a federal court and, in any event, has been stricken by this Court as inconsistent with established principles of federalism. Therefore, petitioners' argument is without legal foundation and does not provide a basis for review by this Court.

III. THIS COURT SHOULD DENY THE PETITION

A. The Statute was designed to modify the conduct of a single entity, the NCAA, and was not intended to address a broad social need.

In the Petition for Certiorari, petitioners argue that certiorari should be granted because the case presents important issues that will purportedly affect "untold thousands." The petitioners attempt to portray the Nevada Statute as a broad social remedy providing benefits for many Nevada citizens otherwise deprived. To the contrary, the only people who could be directly affected by an NCAA enforcement proceeding in Nevada are a few Nevada student-athletes, their coaches, and possibly athletic representatives of an institution. As the District Court found, the Statute "was not designed to address a sensitive social problem. Rather, the challenged state law

is narrowly directed at, and intended to modify, the conduct of a single private entity, the NCAA." P. App. at B-9. Since the Ninth Circuit's decision, invalidating Nevada's effort to regulate the NCAA's enforcement procedures, will directly impact only those involved in the proceedings themselves, petitioners' argument for review is exaggerated and fails to establish a basis for this Court to grant the petition.

B. The existence and effect of legislation in other states confirm the propriety of the Ninth Circuit's decision.

Petitioners assert that certiorari is merited because three other states have enacted statutes which dictate that the NCAA must abandon its internal procedures upon which the members have agreed, and mandate that the Association apply different rules and standards in each of those states.[18] Despite petitioners' argument, however, the existence of the Nebraska, Florida and Illinois legislation does not compel review by this Court. To the contrary, the promulgation of legislation in these states confirms that the Ninth Circuit's decision was correct; the NCAA cannot survive if subject to varying, statutorily-imposed mandates in different states. The extraterritorial effect of the Nevada Statute is only highlighted by the fact that other states have followed suit and established

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[18] Petitioners also contend that similar legislation has been introduced in California, Iowa, Kansas, South Carolina and New York. In fact, it appears that proposed legislation, mandating NCAA compliance with state-dictated procedures, is currently pending only in New York.

inconsistent sets of procedures under which the NCAA cannot function. Thus, the presence of other, inconsistent legislation affirms the propriety of the Ninth Circuit decision and is not a valid basis for granting the petition.

CONCLUSION

For the reasons stated herein, the Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit by Petitioners Jerry Tarkanian, Tim Grgurich, Ronald Ganulin and Shelley Fischer should be denied.

Respectfully submitted,

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